87
CORRECTED COPY

Supreme Court, U.S.
FILED
071080 FEB 15 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Petitioner,

v.

CITY OF JACKSON, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

KEVIN J. HASSON
Counsel of Record
ERIC C. RASSBACH
ROGER T. SEVERINO
LORI HALSTEAD WINDHAM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
Telephone: (202) 955-0095

Counsel for Petitioner

QUESTION PRESENTED

Does forcing a religious organization to forgo the religious exercise of ministering to the elderly and disabled using property it owns constitute a "substantial burden" on that religious exercise under RLUIPA Section 2(a)?

PARTIES TO THE PROCEEDING

Petitioner The Greater Bible Way Temple of Jackson was the plaintiff-appellee below. Respondents City of Jackson, Jackson Planning Commission and Jackson City Council were defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29(6), Petitioner The Greater Bible Way Temple of Jackson states that it does not have a parent corporation, nor does it issue any stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Church and its planned ministry to the elderly and disabled 4

B. The City denies the Church's rezoning application 7

C. The Church prevails in the lower court and the intermediate appellate court but loses in the Michigan Supreme Court 9

REASONS FOR GRANTING THE WRIT 12

I. The Michigan Supreme Court's decision deepens a three-way split among the federal courts of appeals and state

supreme courts over RLUIPA's substantial burden standard 12

A. Six Courts of Appeals and two state supreme courts have created three different definitions of "substantial burden" 12

1. The "effectively impracticable" standard 12

2. The "coercion" standard 14

3. The *Constantine* standard 15

B. The Michigan Supreme Court's adoption of the "effectively impracticable" standard creates an intra-Michigan split 18

II. This case is an appropriate one for resolving the disarray 19

CONCLUSION 20

APPENDIX 1a

Opinion of the Michigan Supreme Court (June 27, 2007) 1a

Opinion of Michigan Court of Appeals (November 10, 2005) 45a

Opinion and Order of Circuit Court for the County of Jackson (February 25, 2003) 62a

Final Order of Circuit Court for the County of Jackson (September 3, 2003) 70a

Order of Michigan Supreme Court Denying Rehearing (September 18, 2007)..... 76a

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* 77a

Claim of Appeal 88a

Excerpts from the City of Jackson Code of Ordinances 99a

TABLE OF AUTHORITIES

Cases

Cambodian Buddhist Soc'y v. *Planning and Zoning Comm'n*, —A.2d—, 2008 WL 248053 (Conn. Feb. 12, 2008) 17
Civil Liberties for Urban Believers v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) 12, 13
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *City of West Linn*, 111 P.3d 1123 (Or. 2005) 15
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 10
DiLaura v. *Township of Ann Arbor*, 112 Fed.Appx. 445 (6th Cir. 2004) 14
Grace United Methodist Church v. *City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006) 17
Guru Nanak Sikh Soc'y v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006) 16, 20
Korzan v. *City of Mitchell*, 708 N.W.2d 683 (S.D. 2006) 19
Lighthouse Institute for Evangelism v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004) 13
Living Water Church of God v. *Charter Township of Meridian*, 2007 WL 4322157 (6th Cir. Dec. 10, 2007) 3, 15, 18, 20
Midrash Sephardi v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) 14, 19
Petra Presbyterian Church v. *Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007) 16
Spratt v. *Rhode Island Department of Corrections*, 482 F.3d 33 (1st Cir. 2007) 17
Sts. Constantine and Helen Greek Orthodox Church v. *City of New Berlin*, 396 F.3d 895

(7th Cir. 2005) 13, 15, 16
The Greater Bible Way Temple of Jackson v. *City of Jackson*, 708 N.W.2d 756 (2005) 1
The Greater Bible Way Temple of Jackson v. *City of Jackson*, 733 N.W.2d 734 (2007) 1
Thomas v. *Review Board*, 450 U.S. 707 (1981) 17
Westchester Day School v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) 17

Statutes

28 U.S.C. § 1257 2
CITY OF JACKSON CODE OF ORDINANCES 7
Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* 2, 3, 8, 9, 10, 12, 13, 14, 17

Other Authorities

2003 COMPREHENSIVE PLAN, CITY OF JACKSON (2003) 4
Louis Aguilar, "Economist: Michigan in fourth year of recession," THE DETROIT NEWS (Jan. 30, 2008) 4

IN THE

Supreme Court of the United States

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Petitioner,

v.

CITY OF JACKSON, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

The Greater Bible Way Temple of Jackson respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 733 N.W.2d 734. Appendix ("App.") at 1a. The opinion of the Michigan Court of Appeals is reported at 708 N.W.2d 756. App. 45a. The opinion

of the Circuit Court of Jackson County is not reported but is included in the Appendix, App. 62a.

JURISDICTION

The Michigan Supreme Court's judgment was entered on June 27, 2007. App. 1a. On September 18, 2007, the Michigan Supreme Court denied rehearing. App. 76a. On December 12, 2007, Justice Stevens extended the time for petition for writ of certiorari to be filed to and including February 15, 2008. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc provides:

> (a) Substantial burdens
>
> (1) General rule
>
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

App. 77a-78a.

STATEMENT OF THE CASE

Petitioner Greater Bible Way Temple ("the Church") seeks plenary review of a decision of the Michigan Supreme Court. That decision vacated an intermediate appellate court decision holding that denial of a rezoning application for the Church's property substantially burdened the Church's religious exercise in violation of RLUIPA. The Michigan Supreme Court's holding that the land use denial did not substantially burden the Church is in direct conflict with decisions from of the United States Courts of Appeals, including the Sixth Circuit's recent decision in *Living Water Church of God* v. *Charter Township of Meridian*, 2007 WL 4322157 (6th Cir. Dec. 10, 2007), which will be the subject of a forthcoming petition for a writ of certiorari by undersigned counsel.[1]

---

[1] Undersigned counsel represent the plaintiff in *Living Water* and intend to file a petition in that case on or before March 10.

A. The Church and its planned ministry to the elderly and disabled.

Greater Bible Way Temple is a Christian church located in an economically distressed part of Jackson, Michigan. The Church believes in serving not only its own members, but the surrounding community. As its mission statement explains: "[the Church] stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes housing, employment, consulting and supports as determined appropriate in fulfilling our Mission." R.153a12-13.[2] As its mission statement explains, the Church is committed to serving those in need and providing assistance to the community of Jackson. R.153a13.[3]

Jackson, like many communities in Michigan, is suffering from high unemployment and an economic recession now entering its fifth year.[4] Even before the recession, Jackson struggled with poverty, with 41% of its households making less than $25,000 per

---

[2] "R." citations are citations to the record, as numbered in the Plaintiff's appendix before the Michigan Supreme Court. "App." citations are to the attached appendix.

[3] The Church's outreach to the community is also documented on its website, www.gbwt.org.

[4] Louis Aguilar, "Economist: Michigan in fourth year of recession," THE DETROIT NEWS (Jan. 30, 2008); *see also* 2003 COMPREHENSIVE PLAN, CITY OF JACKSON, at *x* (2003) (available at http://www.cityofjackson.org/departments/regionii/pdfs/2003complan.pdf).

year.[5] As City officials have explained, the City needs more housing for the poor and for underserved populations. *See* R.484a. During the pendency of this litigation, the City revamped its general plan and included a call for more housing development. R.483a-84a. As one City planner explained, "We need housing units of all types . . . we need housing for the elderly." R.484a; *see also* R.529a.

The Church is aware of this need and seeks to meet it. For several years, the Church, through an affiliated ministry,[6] has provided affordable housing for the developmentally disabled at different locations in surrounding communities. App. 65a; R.191-94a.

The Church is located in northwest Jackson, across the street from a large low-income housing development, in a neighborhood which includes undeveloped land, single-family homes, and several Habitat for Humanity projects. R.516-17a, 559a; *see* R.342a (zoning map); *see also* R.948a (aerial map of neighborhood). The Church acts as a community center for its part of Jackson, using its facilities to provide the community with day care, youth athletic programs, programs for children with developmental disabilities, and special recreational programs for the disabled. R.645-46a.

---

[5] *Id.*

[6] That ministry, Christ-Centered Homes, is not a party to this dispute; the Church planned to maintain ownership and control of the housing development here. R.689-90.

In 2001, the Church purchased property across the street from its main church building "for the purpose of constructing an assisted living center for elderly and disabled people." App. 46a; R.380a. The Church chose this ministry because providing housing to those in need is part of its religious mission, and Jackson needs more affordable housing for the elderly and disabled. R.153a12-153a13. As the Court of Appeals explained, "[p]roviding housing to the elderly and disabled 'is central' to plaintiff's ministry in Jackson." App. 51a. The Church believes "[t]his mission is given to the church through the teachings of Jesus Christ"; and, more than mere suggestion, it "is a religious belief held by the Greater Bible Way Temple." *Id*; *see also* R.153a12-153a13 (affidavit describing the importance of this ministry). For this reason, "providing housing and services to the community is not only part of plaintiff's mission as a church but is central to its religious faith." App. 51a-52a.

This project was to be different from the Church's other efforts, close enough to the church for the elderly and disabled residents to easily participate in religious worship, social activities, and meals provided by the Church. App. 52a, 65a. This proximity would benefit both the Church, which seeks to serve, and the residents, who would have access to the services the Church provides. *Id.;* R.153a13-153a14. For this reason, the Court of Appeals held it was "necessary for the apartment complex to be close to the church." App. 52a.

The property is a 1.13-acre parcel of vacant land zoned R-1 (single family residential). Across the

street from the Church's main building, it borders a playground, some empty lots and single-family residences.[7] The surrounding area includes a variety of zones, including R-1 (single family residential), R-4 (apartment/office), and I-1 (light industrial). R.153a14. The Church investigated whether it could find R-3 (multiple-family residential) property nearby, but found none for sale near the church: "there was no dispute that available property zoned R-3 near the church does not exist." App. 52a-53a. In fact, no R-3 property was for sale anywhere in the City. R.153a16-17.[8]

B. The City denies the Church's rezoning application.

The Church therefore applied for a rezoning, which would allow it to construct multi-family apartments on the site. App. 46a That was unremarkable. The City regularly modifies its zoning map in this manner in response to property owners' requests; a city planning official testified that changes, requests and rezonings take place "all

---

[7] App. 7a; R.342a (zoning map); *see also* R.948a (aerial map of neighborhood).

[8] Nor was any R-4 property for sale. One parcel, which was smaller than the current parcel and had mixed R-4 and industrial zoning, was available at one point, but the Church's realtor was unable to learn anything further about the site. R.153a17. Because the City permits apartments to be built on only R-3- or R-4-zoned land, that property, too, would have required rezoning. CITY OF JACKSON CODE OF ORDINANCES § 28-71.

the time," and that multiple-family housing is "often" permitted in R-1 zones. R.510-11a.

The application made its way through the administrative process and arrived at the City Planning Commission. Zoning officials and staff were hostile to the idea, though the Church's application was supported by several elected officials, who praised the Church's work in the community, and by the Center for Independent Living, which expressed the need for accessible housing. R.120-22a. After a public hearing,[9] the Planning Commission voted to recommend denial of the rezoning. App. 2a; R.23-24a. The Church then took its application to the City Council. The Council held a hearing at which several people spoke in favor of the Church. R. 25a. The Council nevertheless voted to deny the rezoning. *Id.*

In its denial, the City cited concerns over traffic, blight, and urban sprawl. App. 54a. At trial, the City failed to prove that any of the three interests was necessarily implicated by the Church's project. App. 54a-56a, 72a-73a. In particular, there was no proof that blight or sprawl would necessarily occur; in fact, some testimony indicated that projects like the Church's improve distressed neighborhoods. App. 54a-56a; R. 665-66, 672-73. The supposed traffic problems were only likely to occur "two or three times a year."[10] App. 54a.

---

[9] At the hearing, seven people spoke in favor of the rezoning, and only one person spoke against it. R.127a.

[10] A City official later conceded that elder housing such as that proposed here generally creates less traffic than traditional

The City took these factors into account in its decision, but failed to take into account another. The City admits that it did not even consider RLUIPA when evaluating the Church's rezoning request. R.540-41a.[11] The director of the Planning Commission testified that he did not believe RLUIPA required him to hold religious land use "to a separate standard." R.542a. Accordingly, no one on the planning staff or planning commission took RLUIPA into account when making the decision on the Church's application. *See id*; R.556a. Nor did they take into account the impact upon the church's religious exercise. *See id.*

As a result of the denial, the Church is unable to develop the property with accessible apartments for the disabled and elderly. Because there are no other R-3 properties available near the Church, App. 52a, the Church is unable to engage in its planned ministry to the elderly and disabled in its immediate neighborhood.

C. The Church prevails in the lower court and the intermediate appellate court but loses in the Michigan Supreme Court.

The Church appealed the denial to the Circuit Court for the County of Jackson, alleging that the

---

apartment homes, and creates "less of an impact on an area." R.514a.

[11] *See also* R.60a ("The fact that a religious organization was the party requesting rezoning never once was a factor in [the City's] decisionmaking process.")

denial violated state law and RLUIPA § 2(a), the "substantial burdens" provision. App. 89a-98a. The court dismissed the state claim. R.49a-51a. On cross-motions for summary disposition, the court granted summary disposition for the Church on two elements of its RLUIPA claim: that the City's process for evaluating rezoning applications was a system of individualized assessments, within the meaning of RLUIPA, and that the denial of the Church's application substantially burdened its religious exercise. App. 63a-69a. The court then held a bench trial and found that the City failed to establish a compelling governmental interest justifying the denial. App. 70a-75a. The court also reaffirmed its earlier ruling that the Church's religious exercise had been substantially burdened. *Id.*

The Michigan Court of Appeals affirmed (and also upheld RLUIPA § 2(a) against an Establishment Clause challenge, citing this Court's opinion in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005)). App. 45a-61a.

The Michigan Supreme Court reversed. In fact, it did so on every conceivable basis. First it held that RLUIPA was simply inapplicable because an application for rezoning was not an "individualized assessment." The Court determined that there was no government "individualized assessment" despite the fact that the Church made the rezoning request for only one parcel and was denied only after the city analyzed the specific impacts of the change. App. 17-18a. Key to its holding was the Court's determination that to grant the rezoning request would affect "the entire community" since the rezoned parcel could be sold with the new zoning

designation to a third party sometime in the future. *Id.*

On the question of religious exercise, although the Court acknowledged that the Church's mission is to "further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson," the Court framed the Church's request as merely one for "building an apartment complex." App. 21-23a. Framed as such, the Court found that religious exercise is not inherent in the construction of apartment buildings. *Id.*

As for substantial burden, the Court took the position that "[i]f plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes;" therefore, so long as the Church could theoretically build somewhere else, by definition the denial could not impose a substantial burden on the Church. App. 32-33a.

Finally, the Court overturned the lower court's trial finding that the City's "concern over zoning [does not] establish[] a compelling State interest" sufficient to justify the City's unlawful denial of the Church's rezoning request. App. 34a. The Court reasoned that because courts will generally only "overturn a zoning ordinance excluding other uses from a single-family residential area if it is arbitrary or capricious" under state law, and because the City believes that rezoning may, at least in theory, contribute to blight, then the government interest in

denying the Church's request to rezone one parcel in a residential zone was compelling. App. 36-39a.[12]

REASONS FOR GRANTING THE WRIT

I. The Michigan Supreme Court's decision deepens a three-way split among the federal courts of appeals and state supreme courts over RLUIPA's substantial burden standard.

The decision below only adds further confusion to an already chaotic legal landscape. In fact, it not only broadens the divergence among the lower courts, it actually deepens it, by creating a divergence between the federal and state courts within Michigan itself.

A. Six Courts of Appeals and two state supreme courts have created three different definitions of "substantial burden."

Since Congress passed RLUIPA in 2000, six different Courts of Appeals and two state supreme courts have defined "substantial burden" under RLUIPA's land use provisions. They fall into three camps:

1. The "effectively impracticable" standard.

In *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), the

---

[12] The Court also found that the rezoning denial was the least restrictive means available for preserving the City's interest in residential zoning. App. 39-41a.

Seventh Circuit defined a substantial burden as a law which "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Id.* at 761. *CLUB* involved a broad RLUIPA challenge to an entire zoning code that permitted churches in some districts, but required them to obtain permits or rezonings in others. *CLUB*, 342 F.3d at 761. And the Seventh Circuit has since limited *CLUB* to those facts—that is, to cases where the religious organization is not simply challenging the denial of its individual permit, but rather is challenging the permitting process as a whole. *Sts. Constantine and Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005).

Nevertheless, *CLUB's* "effectively impracticable" standard has taken on a life of its own, notably in the Third Circuit, and now in the Michigan Supreme Court. In *Lighthouse Institute for Evangelism* v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004), the Third Circuit held that where a church could rent space elsewhere or "could have operated as a church by right in other districts" there could be no substantial burden in denying it the right to function at the particular property it owned. *Id.* at 76-77 (citing *CLUB*, 342 F.3d at 761). By applying the *CLUB* standard to the denial of an individual permit, the Third Circuit has turned RLUIPA's substantial burden protection into a reiteration of RLUIPA's separate prohibition on total exclusion, RLUIPA Section 2(b)(3)(A).

The Michigan Supreme Court has done the same thing here. It has applied the effectively impracticable standard to the denial of the Church's individual rezoning application, holding that 'the city's refusal to rezone the property so plaintiff can build an apartment complex does not constitute a "substantial burden" on plaintiff's religious exercise. App. 33a. Why not? Because, the Court explained, the "city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes." App. 33a. This interpretation, like the Third Circuit's, makes RLUIPA Section 2(a) a redundancy.

2. The "coercion" standard.

The Eleventh Circuit has expressly rejected *CLUB*'s "effectively impracticable" standard. *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). *Midrash* instead defined a substantial burden as something "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1227. It ruled that exclusion from a particular district (where the plaintiff synagogues rented property) was not in and of itself a substantial burden. *Id.* at 1228. In short, under this standard, a "substantial burden" is something more than exclusion from a particular piece of property, but something less than exclusion from the entire jurisdiction. *Id.*

The Sixth Circuit also applies a variation of the coercion standard. It had first defined a substantial burden as one which would "substantially limit the plaintiffs' intended use of the property," thereby "effectively barr[ing] the plaintiffs from using the property in the exercise of their religion." *DiLaura* v. *Township of Ann Arbor*, 112 Fed.Appx. 445, 446 (6th Cir. 2004). In *Living Water*, it refined this test, effectively falling more in line with the Eleventh Circuit. It now defines a substantial burden as government action that "place[s] substantial pressure on [the claimant] to violate its religious beliefs or effectively bar[s] the church from using its property in the exercise of religion." *Living Water*, 2007 WL 4322157 at *8.

Similarly, the Supreme Court of Oregon has held that "government regulation imposes a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (en banc).

3. The *Constantine* standard.

Finally, the Second, Seventh, and Ninth Circuits have all settled on broader, more flexible standards. The leading case for this faction is *Sts. Constantine and Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (Posner, J.).

Constantine focused more on the government's treatment of the religious applicant than on any resulting coercion or on the availability of alternatives. It held that the fact "[t]hat the burden would not be insuperable would not make it insubstantial," and that substantial burdens may result from the "delay, uncertainty, and expense" of multiple land use applications. *Constantine*, 396 F.3d at 901. The court noted that, while broad, the definition was appropriate in situations where the "state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Id.* at 900. "[T]he 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Constantine*, 396 F.3d at 900. Likewise, in *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (Posner, J.), the Court held that having the "reasonable expectation of obtaining a permit" but failing to receive one could constitute a substantial burden. (In its opinion here, the Michigan Supreme Court bluntly rejected the Seventh Circuit's approach. App. 32a.)

The Ninth Circuit has adopted a similarly fact- and history-based approach, describing a substantial burden as a government restriction that "to a significantly great extent lessened the possibility that future [land use] applications would be successful." *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978, 989 & n.12 (9th Cir. 2006). In *Guru*, the history of the Sikh temple's attempts to

find a place to build its house of worship, and the expectation that it would be denied again, were crucial to finding a substantial burden. *Id.* at 989.

The Second Circuit has also embraced a fact-based approach to the substantial burden question. In one instance it found a substantial burden where "the arbitrary, capricious, or unlawful nature of a defendant's challenged action suggest[ed] that a religious institution received less than even-handed treatment." *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007). The court did not limit substantial burdens to such circumstances, suggesting it also might find burdens where an absolute permit denial might "place substantial pressure on [a religious organization] to change its behavior," so long as there is "a close nexus between the coerced or impeded conduct and the institution's religious exercise." *Id.* at 350.

Finally, two other Circuits have referred to the substantial burden standard in *dicta* but have not yet chosen sides. *See Spratt* v. *Rhode Island Department of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (assuming, *arguendo*, that the "substantial pressure" formulation of *Thomas* v. *Review Board*, 450 U.S. 707 (1981) applies); *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661-63 (10th Cir. 2006) (noting that RLUIPA altered the court's earlier definition of "substantial burden," but not articulating a new definition). And recently the Connecticut Supreme Court questioned the entire premise of RLUIPA's substantial burden provisions. *See Cambodian Buddhist Soc'y* v. *Planning and Zoning Comm'n*, —A.2d—, 2008 WL 248053 (Conn.

Feb. 12, 2008). The court stated that "the provision reasonably cannot be characterized as plain and unambiguous," noted the Circuit split, *id.* at *9-14, and then disposed of the case on other grounds. *Id.* at *14.

B. The Michigan Supreme Court's adoption of the "effectively impracticable" standard creates an intra-Michigan split.

The effects of the split are especially acute in Michigan. The holdings in this case and in *Living Water* have created an intra-Michigan split of authority. As set forth above, the Michigan Supreme Court has essentially adopted the "effectively impracticable" standard while the Sixth Circuit has adopted a variant of the coercion test. *Living Water*, 2007 WL 4322157 at *8.

The Michigan Supreme Court's adoption of the "effectively impracticable" standard means that a plaintiff in Michigan state court can prevail on a substantial burden claim only if it can show that there is nowhere within the entire municipality where it can engage in religious exercise. This "effectively impracticable" standard makes it in fact effectively impracticable for a RLUIPA plaintiff to win any substantial burden claim unless the defendant municipality has banished religious institutions altogether.[13]

---

[13] As noted above, this makes RLUIPA's substantial burden provisions identical in effect to RLUIPA's total exclusion provisions. *See* 42 U.S.C. § 2000cc (2)(b)(3)(a).

If that same plaintiff brings its claim in Michigan federal court, however, it will not have to prove that there is nowhere in the municipality where it could engage in religious exercise. Instead it need only show that the defendant's land use regulations make it impossible for it to engage in any religious exercise on its property. Though this standard is hardly generous, it is better than the Michigan Supreme Court's. RLUIPA plaintiffs will have a strong—and unwarranted—incentive to bring their claims in federal rather than state court. Similarly, since RLUIPA is sometimes raised as an affirmative defense in state court proceedings, *see, e.g.*, *Korzan* v. *City of Mitchell*, 708 N.W.2d 683 (S.D. 2006), plaintiffs seeking to avoid the defense would bring their lawsuits in state court.

Clearly matters are getting out of hand and warrant this Court's attention.

II. This case is an appropriate one for resolving the disarray.

There are no insurmountable obstacles to prevent the Court from using this case to resolve the disarray among the lower courts. To be sure, as set forth above, the Michigan Supreme Court ruled in the alternative on several separate grounds. Indeed, it seems to have left no stone unturned. However, the only two alternative grounds that are potentially significant are that court's remarkable holdings that the denial of an individual application for rezoning is somehow not an individualized assessment, and that the church's demonstrated commitment to housing the needy was somehow not a religious one. Both are

indeed logically prior to the question here, but neither need delay the Court long. *Cf. Guru Nanak*, 456 F.3d at 986 ("RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use"); *Midrash Sephardi*, 366 F.3d at 1225 ("Surfside officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways.").

The remaining questions, whether the city has a compelling interest in its zoning scheme, and whether it is serving that interest by the least restrictive means available, are logically subsequent to the question here and can easily be dealt with by remand.

Should the Court prefer otherwise, however, we would respectfully note that undersigned counsel is currently preparing a petition in *Living Water Church of God* v. *Charter Township of Meridian*, 2007 WL 4322157 (6th Cir. Dec. 10, 2007) (unpublished). That petition will be filed on or before March 10 and will present a very similar question for review. Petitioner respectfully requests that the Court hold this Petition for disposition in light of its disposition of *Living Water*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN J. HASSON
Counsel of Record
ERIC C. RASSBACH
ROGER T. SEVERINO
LORI HALSTEAD WINDHAM
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036-1735
(202) 955-0095

Counsel for Petitioners

February 15, 2008

APPENDIX

Michigan Supreme Court

Opinion

FILED JUNE 27, 2007

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Plaintiff-Appellee,

v Nos. 130194, 130196

CITY OF JACKSON, JACKSON PLANNING COMMISSION, AND JACKSON CITY COUNCIL,

Defendants-Appellants.

BEFORE THE ENTIRE BENCH

MARKMAN, J.

We granted leave to appeal to consider whether the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC 2000cc *et seq.*, entitles plaintiff to the rezoning of its property from single-family residential to multiple family residential to allow plaintiff to build an apartment complex. The lower courts held that RLUIPA does entitle plaintiff to the rezoning of its property. We conclude that a refusal to rezone does not constitute an "individualized assessment," and, thus, that RLUIPA is inapplicable. Further, even if

RLUIPA is applicable, the building of an apartment complex does not constitute a "religious exercise," and even if it does constitute a "religious exercise," the city of Jackson's refusal to rezone plaintiff's property did not substantially burden plaintiff's religious exercise, and even if it did substantially burden plaintiff's religious exercise, the imposition of that burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. Therefore, even assuming that RLUIPA is applicable, it has not been violated. For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the trial court for the entry of a judgment in favor of defendants.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff wants to build an apartment complex across the street from its church on property that it owns in the city of Jackson. The property consists of eight lots totaling 1.13 acres. The property is zoned single-family residential (R-1). One of the lots contains a single-family residence, and the remaining lots are vacant. There are single-family residences on each side of the property. Plaintiff petitioned the city to change the zoning of the property to multiple-family residential (R-3) so that it could construct an apartment complex.

The Region 2 Planning Commission recommended denying plaintiff's rezoning petition. After a public hearing, the city planning commission also voted to recommend that the city council deny plaintiff's rezoning petition. Pursuant to these

recommendations, and following another public hearing, the city council voted to deny plaintiff's rezoning petition.

Plaintiff then filed a complaint against defendants, containing two counts: count one directly challenged the city's zoning decision and count two alleged a violation of RLUIPA. The trial court granted defendants' motion for summary disposition with regard to count one, which decision was not appealed. With regard to count two, the trial court denied defendants' motion for summary disposition and granted plaintiff's motion for summary disposition in part. Specifically, the trial court ruled that RLUIPA did apply because the city's zoning decision constituted an "individualized assessment," and the refusal to rezone plaintiff's property imposed a "substantial burden" on the exercise of religion. The trial court then ordered a trial on the issue whether the city had a compelling interest for its refusal to rezone. After a bench trial, the trial court ruled that defendants had failed to demonstrate such an interest. Therefore, it determined that defendants had violated RLUIPA and that plaintiff was entitled to the requested rezoning of its property. The trial court enjoined defendant from interfering in any manner with plaintiff's efforts to construct an apartment complex on its property. After the final order was issued, plaintiff filed a motion for attorney fees and costs and the trial court awarded plaintiff over $30,000 in attorney fees and costs.

The Court of Appeals affirmed the trial court in all respects. 268 Mich App 673; 708 NW2d 756 (2005). The Court of Appeals also held that the

application of RLUIPA to compel the requested rezoning did not render the statute unconstitutional. We granted defendants' application for leave to appeal. 474 Mich 1133 (2006).

II. STANDARD OF REVIEW

A trial court's ruling on a summary disposition motion is a question of law that this Court reviews de novo. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). Questions of statutory interpretation are also questions of law that that this Court reviews de novo. *Id.*

III. ORIGINS OF RLUIPA

The First Amendment of the United States Constitution provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." US Const, Am I. The second clause of this amendment is commonly known as the Free Exercise Clause. The protections provided by the First Amendment, including the Free Exercise Clause, have been "incorporated" and extended to the states and to their political subdivisions by the Fourteenth Amendment. *Cantwell v Connecticut*, 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940); *Santa Fe Independent School Dist v Doe*, 530 US 290, 301; 120 S Ct 2266; 147 L Ed 2d 295 (2000).

In *Sherbert v Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), the plaintiff, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on

Saturday, the Sabbath Day of her faith. She was unable to obtain other employment because she would not work on Saturdays. The South Carolina Unemployment Compensation Act, SC Code, Tit 68, § 68-1 *et seq.*, provided that a claimant was ineligible for benefits if the claimant had failed "without good cause" to accept available suitable work. The Employment Security Commission determined that the plaintiff's religious belief against working on Saturdays did not constitute "good cause." The United States Supreme Court held that denying the plaintiff unemployment compensation benefits solely because of her refusal to accept employment in which she would have to work on Saturdays contrary to her religious belief imposed a substantial burden on her exercise of her religion that was not justified by a compelling state interest, and, thus, violated the Free Exercise Clause.

In *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990), the United States Supreme Court held that Oregon's prohibition of the use of peyote in religious ceremonies, and the denial of unemployment benefits to persons discharged for such use, does not violate the Free Exercise Clause of the First Amendment. The Court explained that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified, under the Free Exercise Clause, by a compelling governmental interest.[1]

---

[1] *Smith, supra* at 884, held that *Sherbert* was distinguishable because *Sherbert* involved an "individualized governmental assessment"; that is, the "good cause" standard at

In response to *Smith,* Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA),[2] prohibiting the government from substantially burdening a person's exercise of religion, even by means of a generally applicable, religion-neutral law, unless the government could demonstrate that the burden imposed furthers a compelling governmental interest and that it constitutes the least restrictive means of furthering such interest.

However, in *City of Boerne v Flores*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997), the

---

issue in *Sherbert* allowed the government to consider the plaintiff's "particular circumstances." See pp 15-17 *infra*. That is, *Smith* held that while the "compelling governmental interest" test may be applicable to laws allowing for an "individualized governmental assessment," it is not applicable to generally applicable laws that do not allow for an "individualized governmental assessment."

[2] RFRA provides, in pertinent part:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest. [42 USC 2000bb-1.]

United States Supreme Court held that Congress, in enacting RFRA, had exceeded its powers under § 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause of the First Amendment because RFRA proscribes state conduct that the First Amendment itself does not proscribe.[3] The Court explained:

> Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial . . . ." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

---

[3] Section 5, the Enforcement Clause of the Fourteenth Amendment, provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. [US Const, Am XIV, § 5.]

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. [*Id.* at 519-520.]

The Supreme Court then concluded that the substantial costs that RFRA exacted through its "compelling governmental interest" test "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.* at 534. Thus, "the Court invalidated RFRA as applied to the states, finding it an unconstitutional exercise of Congress' Enforcement Clause powers because Congress had not shown a pattern of religious discrimination meriting such a far-reaching remedy . . . ." Galvan, *Beyond worship: The Religious Land Use and Institutionalized Persons Act of 2000 and religious institutions' auxiliary uses*, 24 Yale L & Policy R 207, 218 (2006).[4]

---

[4] Although RFRA no longer applies to the states, it still applies to the federal government. See *Gonzales v O Centro Espirita Beneficente Uniao Do Vegetal*, 546 US 418; 126 S Ct 1211; 163 L Ed 2d 1017 (2006) (holding that, under RFRA, the Controlled Substances Act, 21 USC 801 *et seq.*, cannot prohibit a religious sect from receiving communion by drinking *hoasca*, a tea that contains a hallucinogen).

In response to *City of Boerne,* Congress enacted RLUIPA. Unlike RFRA, RLUIPA does not attempt to bar all laws that substantially burden religious exercise. Instead, it focuses on land use regulations[5] and provides, in pertinent part:

> (a) Substantial burdens.
>
> (1) General rule. No government[6] shall impose or implement a land use regulation[7]

---

[5] RLUIPA also focuses on regulations pertaining to institutionalized persons, but that portion of RLUIPA is not applicable here.

[6] "Government" is defined as:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law; and
>
> (B) for the purposes of sections 4(b) and 5 [42 USC 2000cc- 2(b) and 2000cc-3], includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law. [42 USC 2000cc-5(4).]

[7] "Land use regulation" is defined as a

in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which—

* * *

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized

---

zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. [42 USC 2000cc-5(5).]

That the city's denial of plaintiff's petition to rezone its property here constitutes a "land use regulation" is uncontested.

assessments of the proposed uses for the property involved. [42 USC 2000cc(a).][8]

"Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc- 5(7)(A). RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). A plaintiff asserting a RLUIPA violation has the burden of presenting prima facie

---

[8] RLUIPA further provides:

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. [42 USC 2000cc(b).]

Plaintiff does not argue that 42 USC 2000cc(b) was violated.

evidence to support the assertion. 42 USC 2000cc-2(b).[9] That is, the plaintiff has the burden to prove that RLUIPA is applicable and that the government has implemented a land use regulation that imposes a substantial burden on the exercise of religion. *Id.* Once the plaintiff has proven this, the burden shifts to the government to prove that the imposition of such burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. *Id.* As the United States Supreme Court has explained, "RLUIPA is [a] congressional effort[] to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter v Wilkinson,* 544 US 709, 714; 125 S Ct 2113; 161 L Ed 2d 1020 (2005). Therefore, it is clearly appropriate to examine the United States Supreme Court's precedents when analyzing RLUIPA.

IV. ANALYSIS

A. INDIVIDUALIZED ASSESSMENT

---

[9] RLUIPA provides, in pertinent part:

> If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USC 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion. [42 USC 2000cc-2(b).]

The threshold question is whether RLUIPA is applicable to this dispute. The burden is on plaintiff to prove that RLUIPA is applicable. 42 USC 2000cc-2(b). RLUIPA "applies only if one of three jurisdictional tests is first met . . . ." *Midrash Sephardi, Inc v Town of Surfside,* 366 F3d 1214, 1225 (CA 11, 2004); see also *Prater v City of Burnside,* 289 F3d 417, 433 (CA 6, 2002) ("the Church may not rely upon RLUIPA unless it first demonstrates that the facts of the present case trigger one of the bases for jurisdiction provided in that statute"); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp,* 259 Mich App 315, 326-327; 627 NW2d 271 (2003) ("[i]n order to establish a claim under RLUIPA, a party must establish that at least one of these three jurisdictional elements exists"). RLUIPA states that it "applies in any case in which,"

> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved. [42 USC 2000cc(a)(2) (emphasis added).][10]

Therefore, the issue is whether a substantial burden has been imposed in the implementation of a land use regulation under which a government is

---

[10] RLUIPA also "applies in any case in which,"

(continued...)

permitted to make an individualized assessment of the proposed uses for the property involved.

This is not the first time that the phrase "individualized assessment" has been employed. The United States Supreme Court distinguished its decision in *Bowen v Roy*, 476 US 693; 106 S Ct 2147; 90 L Ed 2d 735 (1986), from its decisions in *Sherbert* and *Thomas v Review Bd of Indiana Employment Security Div*, 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981), on the basis that the latter decisions, unlike *Bowen*, involved "individualized assessments."[11] "The statutory conditions at issue in

---

(...continued)

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability . . . . [42 USC 2000cc(a)(2).]

However, it is uncontested that A and B are not applicable to the instant case.

[11] In *Sherbert*, as discussed above, the United States Supreme Court held that South Carolina's denial of unemployment compensation benefits to a member of the Seventh-Day Adventist Church who could not find work because her religious convictions prevented her from working on Saturdays abridged her right to the free exercise of her religion. In *Thomas*, the United States Supreme Court held that Indiana's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his employment because his

[*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Roy, supra* at 708. In *Sherbert* and *Thomas*, the Court held that when the government applies individualized exemptions, but refuses to extend an exemption to an instance of genuine "religious hardship," the government must demonstrate a compelling reason for denying the requested exemption. *Id.*

In *Smith, supra* at 884, the United States Supreme Court again emphasized the distinction between governmental action requiring and not requiring individualized assessments.

> The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. . . . [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious

---

religious beliefs prevented him from participating in the production of weapons abridged his right to the free exercise of his religion.

> hardship" without compelling reason. [*Id.*, quoting *Bowen, supra* at 708.]

In *Church of the Lukumi Babalu Aye, Inc v City of Hialeah,* 508 US 520, 527; 113 S Ct 2217; 124 L Ed 2d 472 (1993), the United States Supreme Court, against the backdrop of a ritualistic practice of animal sacrifice by practitioners of the Santerian faith, held that a city ordinance that prohibits a person from "unnecessarily . . . kill[ing] . . . an animal" violates the Free Exercise Clause of the First Amendment. The Court explained:

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct . . . ." As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." [*Id.* at 537 (citations omitted).]

"Individualize" is defined as "to . . . consider individually; specify; particularize." *Random House Webster's College Dictionary* (1991). Therefore, an "individualized assessment" is an assessment based on one's particular circumstances. Accordingly, RLUIPA applies when the government makes an assessment based on one's particular or specific circumstances or has in place procedures or practices that would allow the government to make an assessment based on one's particular or specific

circumstances. As the Ninth Circuit Court of Appeals recently held, "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Society of Yuba City v Sutter Co,* 456 F3d 978, 986 (CA 9, 2006).

In the instant case, the city adopted a zoning ordinance that applied to the entire community, not just to plaintiff. See *West v City of Portage,* 392 Mich 458, 469; . 221 NW2d 303 (1974) ("'[Z]oning ordinances . . . are classified as general policy decisions which apply to the entire community.'") (Citation omitted.) Concomitantly, if the city had granted plaintiff's request to rezone the property, such rezoning would also have applied to the entire community, not just plaintiff.[12] A decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects. See *Sherrill v Town of Wrightsville Beach,* 81 NC App 369, 373; 344 SE2d 357 (1986) ("it is the duty of the zoning authority to consider the needs of the entire community when voting on a rezoning, and not just

---

[12] Although a request to rezone a particular piece of property "'may be differentiated on the basis that such a determination is narrowly confined to a particular piece of property,'" *West, supra* at 469 (citation omitted), it still applies to the "entire community." That is, the "entire community" would be bound by the city's decision to rezone or not rezone the property.

the needs of the individual petitioner"). Thus, if the city had granted plaintiff's request to rezone the property from single-family residential to multiple-family residential, plaintiff could then have sold the property to any third party and that third party could have sold the property to any other third party and any of these parties could have built an apartment complex or any other conforming building on that property. Therefore, the city's decision whether to rezone the property would not have been predicated on plaintiff's particular circumstances or plaintiff's particular project.[13] Even if the city had affirmatively wanted plaintiff to build an apartment complex on its property, it could not have granted the requested zoning change unless it was also prepared to accommodate all projects falling within the scope of the rezoning. Plaintiff's particular circumstances were simply not determinative of the city's decision whether to rezone, and, thus, the city's decision did not constitute an "individualized assessment" within the meaning of that term.[14] Plaintiff has cited no

---

[13] Plaintiff's counsel told the trial court that "even at the planning commission level, they don't care what's being built"; "they don't consider a site

(continued...)

(...continued) plan"; "the site plan itself is irrelevant when it comes to requesting rezoning from R-1 to R-3." Appellant's appendix at 238a, 523a.

[14] Possibly, if plaintiff had requested a variance and the city had refused that request, this might constitute an "individualized assessment." See *Shepherd, supra* at 320 (holding that "[w]hen the Ann Arbor Charter Township Zoning Board of Appeals examined and subsequently denied plaintiff's petition for a variance, an individualized assessment pursuant

cases in support of its position that a refusal to rezone property constitutes an "individualized assessment," and we have found none.

Moreover, plaintiff has presented no evidence to suggest that the city has in place procedures or practices that would permit the city to make "individualized assessments" when determining whether to rezone property.

Because the city's refusal to rezone the property did not constitute an "individualized assessment," and because there is no evidence that the city has in place procedures or practices that would permit it to make "individualized assessments" when determining whether to grant requests to rezone property, RLUIPA is not applicable here.

B. RELIGIOUS EXERCISE

Assuming that RLUIPA is applicable here, the next question is whether the building of an apartment complex constitutes a "religious exercise."

---

to 42 USC 2000cc(a)(2)(C) occurred"). A request for a variance is significantly different from a request to rezone. When one requests a variance, one is requesting permission to use the property for a *specific use*. By contrast, when one requests a rezoning, one is asking the city for permission to use the property for *any use* that would be permitted under the new classification. Therefore, when the city considers a request for a variance, it does consider the specific site plan proposed by the landowner. But, when the city considers a request for rezoning, it considers the numerous different uses that would be permitted under the new classification, and it does not consider a specific site plan.

The burden is on plaintiff to prove that the building of an apartment complex constitutes a "religious exercise." 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the *religious exercise* of a person, including a religious assembly or institution, unless . . . . [42 USC 2000cc(a)(1) (emphasis added).]

"Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc- 5(7)(A). RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). A "religious exercise" consists of a specific type of exercise, an exercise of *religion*, and this is not the equivalent of an exercise-- any exercise-- by a religious body. "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v Beason,* 133 US 333, 342; 10 S Ct 299; 33 L Ed 637 (1890), overruled on other grounds in *Romer v Evans*, 517 US 620, 634; 116 S Ct 1620; 134 L Ed 2d 855 (1996). The United States Supreme Court has explained that "'[t]he "exercise of religion" often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship

service [or] participating in sacramental use of bread and wine . . . .'" *Cutter, supra* at 720, quoting *Smith, supra* at 877.[15] The Supreme Court has further held that "[a]lthough RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion, see 42 U.S.C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. Cf. *Gillette v. United States*, 401 U.S. 437, 457, 91 S. Ct. 828, 28 L. Ed. 2d 168, (1971) ('"The 'truth' of a belief is not open to question" rather, the question is whether the objector's beliefs are "truly held."' (quoting *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965)))." *Cutter, supra* at 725 n 13. Nor, obviously, does RLUIPA bar inquiry into whether a particular belief or practice constitutes an aspect, central or otherwise, of a person's religion.

The question that we must answer is whether plaintiff is seeking to use its property for the purpose of religious exercise.[16] Obviously, not everything that

---

[15] In *Cutter, supra* at 718, the United States Supreme Court held that "RLUIPA's institutionalized-persons provision, § 3 of the Act, is consistent with the Establishment Clause of the First Amendment." The Court also made clear that "Section 2 of RLUIPA [the land use regulation provision] is not at issue here. We therefore express no view on the validity of that part of the Act." *Id.* at 716 n 3.

[16] Notwithstanding the inquiry required by RLUIPA into what constitutes a "religious exercise," this Court is extremely cognizant of the difficulties inherent in a judicial body's evaluating the practices of particular religious faiths or assessing the "centrality" of particular religious precepts. In accord, *Smith, supra* at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative

a religious institution does constitutes a "religious exercise." Plaintiff bears the burden of establishing that its proposed use of the property constitutes a "religious exercise." 42 USC 2000cc-2(b). In the instant case, the only evidence that plaintiff has presented to establish that its proposed use of the property constitutes a "religious exercise" is an affidavit signed by the bishop of the Greater Bible Way Temple. The affidavit states that plaintiff's mission is set forth in its letterhead as follows:

> The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes housing, employment, consulting and supports as determined appropriate in fulfilling our Mission.

The affidavit further states that plaintiff "wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson."[17]

---

disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each . . . judge[] weigh[s] the social importance of all laws against the centrality of all religious beliefs."); *Lemon v Kurtzman*, 403 US 602, 613; 91 S Ct 2105; 29 L Ed 2d 745 (1971) (expressing concern about fostering an "'excessive government entanglement with religion'") (citation omitted).

[17] The bishop's affidavit proceeds to state that "there is a substantial need in the City of Jackson for clean and affordable housing, especially for the elderly and disabled." However, because there is no evidence that the proposed

No evidence has been presented to establish that the proposed apartment complex would be used for religious worship or for any other religious activity. Instead, it appears that the only connection between the proposed apartment complex and "religious exercise" is the fact that the apartment complex would be owned by a religious institution. Generally, the building of an apartment complex would be considered a commercial exercise, not a religious exercise. The fact that the apartment complex would be owned by a religious institution does not transform the building of an apartment complex into a "religious exercise," unless the term is to be deprived of all practical meaning. Something does not become a "religious exercise" just because it is performed by a religious institution. Because plaintiff has not shown that the building of the apartment complex constitutes an exercise in religion, the city's decision not to rezone the property cannot be said to have burdened plaintiff's "religious exercise," and, thus, RLUIPA has not been violated.

C. SUBSTANTIAL BURDEN

Assuming, however, that the building of an apartment complex does constitute a "religious exercise," the next question is whether the city's refusal to rezone the property to allow the apartment complex constitutes a "substantial burden" on that

---

complex would either be limited to housing elderly and disabled persons or be designed to accommodate elderly and disabled persons to any particular extent, it is unnecessary to address whether the building of such a complex would constitute a "religious exercise."

"religious exercise." The burden is on plaintiff to prove that the city's refusal to rezone the property constitutes a "substantial burden" on plaintiff's exercise of religion. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a person, including a religious assembly or institution, unless . . . . [42 USC 2000cc(a)(1) (emphasis added).]

RLUIPA does not define the phrase "substantial burden." However, this is not the first time that the phrase "substantial burden" has been used.

Before deciding *Smith*, the United States Supreme Court held that a "substantial burden" on one's religious exercise that was not justified by a compelling governmental interest violated the Free Exercise Clause. *Jimmy Swaggart Ministries v Bd of Equalization of California*, 493 US 378, 384-385; 110 S Ct 688; 107 L Ed 2d 796 (1990), quoting *Hernandez v Comm'r of Internal Revenue*, 490 US 680, 699; 109 S Ct 2136; 104 L Ed 2d 766 (1989) ("Our cases have established that 'the free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'"). The United States Supreme Court's definition of "substantial burden" in its free exercise cases is instructive in determining what Congress understood "substantial burden" to mean in RLUIPA.

In *Sherbert, supra* at 404, the United States Supreme Court held that a "substantial burden" exists when an individual is "force[d] . . . to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand."

In *Thomas, supra* at 717-718, the Supreme Court explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

In *Lyng v Northwest Indian Cemetery Protective Ass'n,* 485 US 439, 450; 108 S Ct 1319; 99 L Ed 2d 534 (1988), the United States Supreme Court explained that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute "substantial burdens."[18]

---

[18] Relying on *Lyng,* our Court of Appeals held that "for a burden on religion to be substantial, the government regulation

Several federal circuit courts of appeal have also defined the term "substantial burden." Although we are not bound by these decisions, *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), we find them persuasive.

In *Civil Liberties for Urban Believers v Chicago,* 342 F3d 752 (CA 7, 2003), the Seventh Circuit Court of Appeals held that a Chicago zoning ordinance that allows churches as a matter of right in residential zones, but requires them to obtain special use permits in other zones, does not violate RLUIPA. That court explained:

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use-- however minor the burden it were to impose-- could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means. We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one

---

must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient." *Shepherd, supra* at 330.

that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-- including the use of real property for the purpose thereof within the regulated jurisdiction generally-- effectively impracticable.[19]

While [the ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, [it does] not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *See, e.g.*, *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990) ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them") . . . . Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses

---

[19] In *Lighthouse Institute for Evangelism Inc v City of Long Branch*, 100 Fed Appx 70 (CA 3, 2004), the Third Circuit Court of Appeals adopted this same definition of "substantial burden."

> masquerades among the legitimate protections RLUIPA affords to religious exercise. [*Id.* at 761-762 (emphasis in the original).]

In *San Jose Christian College v City of Morgan Hill*, 360 F3d 1024 (CA 9, 2004), the Ninth Circuit Court of Appeals held that there was no RLUIPA violation where the city denied the plaintiff's rezoning application.[20] That court explained:

> A "burden" is "something that is oppressive." BLACK'S LAW DICTIONARY 190 (7th ed. 1999). "Substantial," in turn, is defined as "considerable in quantity" or "significantly great." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed. 2002). Thus, for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a significantly great restriction or onus upon such exercise.
>
> * * *
>
> [W]hile the PUD ordinance may have rendered College unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that College was precluded from using other sites within the city. Nor is there any evidence that the City would not impose the same

---

[20] We note that the court did not address the preliminary question whether RLUIPA was even applicable to the denial of the rezoning application.

> requirements on any other entity seeking to build something other than a hospital[21] on the Property. [*Id.* at 1034, 1035.]

In *Midrash Sephardi,* the Eleventh Circuit Court of Appeals held that an ordinance that prohibits churches and synagogues in the town's business district does not impose a "substantial burden" on the exercise of religion. That court explained:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct. [*Midrash Sephardi, supra* at 1227.]

In *Adkins v Kaspar,* 393 F3d 559 (CA 5, 2004), the Fifth Circuit Court of Appeals held that requiring the presence of a qualified outside volunteer at prison congregations did not impose a "substantial burden" on the plaintiff's exercise of religion. That court explained:

> [A] government action or regulation creates a "substantial burden" on a religious

---

[21] A city task force concluded that the city urgently needed a hospital and this particular piece of property was the only suitable location in the city for a hospital.

> exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs. [T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed. [*Id.* at 570.]

In *Spratt v Rhode Island Dep't of Corrections,* 482 F3d 33 (CA 1, 2007), which involved a blanket ban against all preaching activities by prison inmates, the First Circuit Court of Appeals asserted:

> The district court decided that a "substantial burden" is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," citing *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); see also *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (applying the *Thomas* standard in a RLUIPA case). Assuming arguendo that *Thomas* applies, . . . Spratt has made a prima

> facie showing that his religious exercise has been substantially burdened. [*Id.* at 38.]

In *Grace United Methodist Church v City of Cheyenne,* 451 F3d 643 (CA 10, 2006), the Tenth Circuit Court of Appeals held that the city's denial of the plaintiff church's request for a variance from an ordinance prohibiting any entity from operating a commercial day care center in a residential zone did not violate RLUIPA. That court explained:

> [T]he incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on the exercise of religion. [*Id.* at 662 (citation omitted).][22]

---

[22] In *Murphy v Missouri Dep't of Corrections,* 372 F3d 979, 988 (CA 8, 2004), the Eighth Circuit Court of Appeals held that, to constitute a substantial burden, the government policy or actions

> must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." [Citation omitted.]

Although the Sixth Circuit Court of Appeals has applied the same test when applying RFRA, *Miller-Bey v Schultz,* 1996 US App LEXIS 6541 (CA 6, 1996), it has not yet addressed the meaning of "substantial burden" under RLUIPA. The *Murphy*

After reviewing the above decisions, we believe that it is clear that a "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. That is, a "substantial burden" exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets. A mere inconvenience or irritation does not constitute a "*substantial* burden." Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "*substantial* burden." Rather, a "substantial burden" is something that "coerce[s] individuals into acting contrary to their religious beliefs . . . ." *Lyng, supra* at 450.[23]

---

definition of "substantial burden" seems inconsistent with RLUIPA because RLUIPA specifically defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc-5(7)(A).

[23] We recognize that some courts have held that a "substantial burden" exists where there is "delay, uncertainty, and expense." See, for example, *Sts Constantine & Helen Greek Orthodox Church v City of New Berlin*, 396 F3d 895, 901 (CA 7, 2005), and *Living Water Church of God v Meridian Charter Twp*, 384 F Supp 2d 1123, 1134 (WD Mich, 2005). However, we reject this definition of "substantial burden" both because it is inconsistent with the United States Supreme Court's definition of the phrase and because it is inconsistent with the common understanding of the phrase "*substantial* burden."

In the instant case, plaintiff argues that the city's refusal to rezone its property to allow it to build an apartment complex constitutes a "substantial burden" on its "religious exercise." Even assuming that the building of an apartment complex constitutes a "religious exercise," the city's refusal to rezone the property so plaintiff can build an apartment complex does not constitute a "substantial burden" on that exercise. The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.[24]

"While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city," *Civil Liberties for Urban Believers, supra* at 761, it does not prohibit plaintiff from providing housing. "Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]." *Id.*, quoting *Love Church, supra* at 1086. The city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not

---

[24] Plaintiff was aware when it purchased the property that it was zoned single-family residential. Thus, plaintiff's claim that the city's refusal to rezone the property will cause it to lose the money that it invested in the property is meritless.

substantially burdened plaintiff's exercise of religion. *Lyng, supra* at 450.[25]

D. COMPELLING GOVERNMENTAL INTEREST

Assuming that the city's refusal to rezone the property constitutes a "substantial burden" on plaintiff's "religious exercise," the next question is whether it is "in furtherance of a compelling governmental interest." The burden is on defendant to prove that the imposition of the burden on plaintiff is in furtherance of a compelling governmental interest. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

---

[25] We note that the lower courts' interpretation of the "substantial burden" provision of RLUIPA would seem to render the "discrimination and exclusion" provision of RLUIPA effectively meaningless because it will almost always be easier to prove a "substantial burden" on one's "religious exercise," as those terms

(continued...)

(...continued)
are defined by the lower courts, than it will be to prove discrimination or exclusion. See n 8 *supra*.

> (A) is in furtherance of a *compelling governmental interest* . . . . [42 USC 2000cc(a)(1) (emphasis added).]

After a bench trial on this issue, the trial court held that "this mere concern over zoning [does not] establish[] a compelling State interest." We respectfully disagree. It has long been recognized that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations." *Murphy v Zoning Comm of the Town of New Milford,* 148 F Supp 2d 173, 190 (D Conn, 2001). "'All property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare.'" *Austin v Older,* 283 Mich 667, 677; 278 NW 727 (1938), quoting *State v Hillman,* 110 Conn 92, 105; 147 A 294 (1929). Therefore, a municipal body "clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations." *First Baptist Church of Perrine v Miami-Dade Co,* 768 So 2d 1114, 1118 (Fla App, 2000). "A government's interest in zoning is indeed compelling." *Konikov v Orange Co,* 302 F Supp 2d 1328, 1343 (MD Fla, 2004); see also *Midrash Sephardi v Town of Surfside,* 2000 US Dist LEXIS 22629, *51 (SD Fla, 2000) (holding that "the zoning interests of Surfside may properly be characterized as compelling"). "The compelling state interest and, hence, the municipal concern served by zoning regulation of land use is promotion of health, safety, morals or general welfare." *Home Bldg Co v Kansas City,* 609 SW2d 168, 171 (Mo App, 1980). "[T]he

ordinance serves a compelling state interest; the City['s] . . . police power to regulate the private use of the land." *Lyons, supra* at 5-6. "The city has a cognizable compelling interest to enforce its zoning laws. . . . Reserving areas for commercial activity both protects residential areas from commercial intrusion and fosters economic stability and growth." *Chicago Hts v Living Word Outreach Full Gospel Church and Ministries, Inc,* 302 Ill App 3d 564, 572; 707 NE2d 53 (1998); see also *Daytona Rescue Mission, Inc v City of Daytona Beach,* 885 F Supp 1554, 1560 (MD Fla, 1995) (holding that "the City's interest in regulating homeless shelters and food banks is a compelling interest").

In the instant case, the city has a compelling interest in regulating where apartment complexes can be built within the city. As the United States Supreme Court has explained:

> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and

other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities--until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

> [*Village of Euclid v Ambler Realty Co,* 272 US 365, 394-395; 47 S Ct 114; 71 L Ed 303 (1926).]

See also *Kropf v Sterling Hts,* 391 Mich 139, 159-160; 215 NW2d 179 (1974) (adopting the above analysis in addressing "why the local zoning board could reasonably restrict multiple dwellings in a residential area"). That a court will defer to zoning authorities and will only overturn a zoning ordinance excluding other uses from a single-family residential area if it is arbitrary or capricious is evidence of the magnitude of the municipalities' interest in such zoning ordinances. *Kropf, supra* at 161 (holding that "[i]t is not for this Court to second guess the local governing bodies in the absence of a showing that that body was arbitrary or capricious in its exclusion of other uses from a single-family residential district").

In this case, much testimony was presented regarding the city's interest in preserving single-family neighborhoods. Charles Reisdorf, the Executive Director of the Regional Planning Commission, testified:

> [I]n an area where you have a large number of single-family residences, people have made purchases with the expectation that there will be some stability in the neighborhood. For most of us, the purchase of a home is the major expense of our life . . . . And so when you— when you have something that's incompatible interjected into a neighborhood area, it creates problems and often results in a blighting situation . . . .

Dennis Diffenderfer, a planner who has been with the city's Department of Community Development for nearly 20 years, testified:

> [A]ny time you even add a duplex or a three- or four-unit or a number of buildings that convert to rental, it does have a negative effect on the adjoining neighbors. I can speak not only as a housing professional, but from experiences.

Charles Aymond, who has served as the chairman of the Jackson Planning Commission for over ten years, testified:

> [T]he City has experienced a great deal of blight and destabilization as the result of commercial enterprises . . . or different residential uses coming into what is generally referred to as a higher residential use.

Plaintiff's own architect, James Pappas, testified that if the property was rezoned multiple-family residential, as the plaintiff desires, a 45-foot apartment complex would be permitted and this would be "inappropriate with that neighborhood."

Given the city's general interest in zoning, and the city's specific interest in maintaining the character of this single-family residential neighborhood, we conclude that the city has a compelling interest in maintaining single-family residential zoning and in not rezoning this area of the city.

E. LEAST RESTRICTIVE MEANS

Given that the imposition of the burden on plaintiff is in furtherance of a compelling governmental interest, the final question is whether a particular governmental action constitutes the "least restrictive" means of furthering that interest. 42 USC 2000cc(a)(1)(B). The burden is on defendant to prove that an action constitutes the least restrictive means of furthering the compelling governmental interest. 42 USC 2000cc-2(b). RLUIPA provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the *least restrictive means* of furthering that compelling governmental interest. [42 USC 2000cc(a)(1) (emphasis added).]

In the instant case, plaintiff asked the city to rezone the property from single-family residential to multiple-family residential. In response, the city could have done one of two things-- it could have granted or it could have denied plaintiff's request to

rezone the property. The city decided to deny plaintiff's request to rezone the property. That is, the city decided to maintain the single-family residential zoning. There do not appear to be any less restrictive means of maintaining the single-family residential zoning.

For these reasons, we conclude that any burden placed on plaintiff's exercise of religion is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that compelling governmental interest.[26] Therefore, even assuming that RLUIPA is applicable in the instant case, it has not been violated.[27]

---

[26] 42 USC 1988(b) provides, "In any action or proceeding to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." For the reasons discussed herein, plaintiff is not a "prevailing party," and, therefore, is not entitled to attorney fees.

[27] As discussed above, in *City of Boerne,* the United States Supreme Court held that Congress, in enacting RFRA, had exceeded its power under § 5 of the Fourteenth Amendment to enact legislation enforcing the Free Exercise Clause because RFRA proscribes state conduct that the First Amendment itself does not. In *Smith,* the United States Supreme Court held that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified under the Free Exercise Clause by a compelling governmental interest. However, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship'

(continued...)

V. CONCLUSION

RLUIPA applies to burdens imposed by governmental bodies on "religious exercises" in the course of implementing land use regulations under which "individualized assessments" may be made of the proposed uses for the land. An "individualized assessment" is an assessment based on one's particular or specific circumstances. A decision concerning a request to rezone property does not involve an "individualized assessment." Therefore, RLUIPA is not applicable here.

A "religious exercise" constitutes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 USC 2000cc- 5(7)(A). However, something does not become a "religious exercise" just because it is carried out by a religious institution. Because the only connection between religion and the construction of the apartment

---

(...continued)
without compelling reason." *Smith, supra* at 884. Proponents of RLUIPA argue that Congress has the authority to enact RLUIPA because it merely codifies *Smith*. However, the lower courts in the instant case held that, under RLUIPA, a religious institution need not abide by a generally applicable, religion-neutral zoning ordinance unless it is justified by a compelling governmental interest. This seems inconsistent with the Free Exercise Clause as interpreted in *Smith,* which, held that a generally applicable, religion-neutral law does *not* have to be justified by such an interest. Whenever possible, courts should construe statutes in a manner that renders them constitutional. *People v Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973). Because the lower courts' interpretation of RLUIPA would render RLUIPA unconstitutional, we reject their interpretation and instead adopt the interpretation set forth in this opinion.

complex in this case is the fact that the apartment complex would be owned by a religious institution, the building of the apartment complex does not constitute a "religious exercise."

A "substantial burden" on one's "religious exercise" exists where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires. A mere inconvenience or irritation does not constitute a "*substantial* burden"; similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a "substantial burden." Because the city has not done anything to coerce plaintiff into acting contrary to its religious beliefs, the city has not substantially burdened plaintiff's religious exercise.

Even if the city did substantially burden plaintiff's religious exercise, imposition of that burden here is in furtherance of a compelling governmental interest, namely, the enforcement of local zoning ordinances, and constitutes the least restrictive means of furthering that compelling governmental interest. Therefore, even assuming that RLUIPA is applicable, RLUIPA was not violated. For these reasons, we reverse the judgment of the Court of Appeals and remand this case to the

trial court for the entry of a judgment in favor of defendants.

Stephen J. Markman
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.

STATE OF MICHIGAN

COURT OF APPEALS

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Plaintiff-Appellee,

v

CITY OF JACKSON, JACKSON PLANNING COMMISSION, and JACKSON CITY COUNCIL,

Defendants-Appellants.

FOR PUBLICATION
November 10, 2005
9:00am

Nos. 250863;255966
Jackson Circuit Court
LC No. 01-003614-AS

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

METER, J.

In this case involving the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC

2000cc *et seq.*, defendants appeal as of right from a judgment for plaintiff entered after a bench trial. Defendants also appeal as of right from an order awarding plaintiff attorney fees and costs. We affirm in both cases.

Plaintiff purchased eight parcels of land for the purpose of constructing an assisted living center for elderly and disabled people, and it sought a rezoning of the parcels from "single-family residential" (R-1) to "multiple-family residential" (R-3). After the city of Jackson denied the rezoning request, plaintiff sued, alleging, in part, a violation of the RLUIPA. The court, after a bench trial, entered an order that enjoined defendants from preventing plaintiff "from building the originally proposed housing plan of 32 units, or any plan with a lesser burden, on said lots that comports with R-3 zoning as defined in the Jackson Coty [sic] code...." The order also prohibited defendants from implementing or imposing a land use regulation in a manner that would impose a substantial burden on the religious exercise of plaintiff in its development and use of the lots, absent compelling interests.

On appeal, defendants first argue that the trial court erred in ruling before trial that defendants' denial of the request for rezoning constituted an individualized assessment within the meaning of the RLUIPA. The court made this ruling in connection with defendants' motion for summary disposition under MCR 2.116(C)(10). We review de novo a trial court's ruling with regard to a motion for summary disposition. *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*, 259 Mich App 315,

324; 675 NW2d 271 (2004). "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Shepherd Montessori, supra* at 324. "[The] court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id.* "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Id.*

As this Court recently explained in *Shepherd Montessori, id* at 319, "[the] RLUIPA prohibits a governmental entity from imposing on a person, or on a religious institution or assembly, a land use regulation that substantially burdens the free exercise of religion." See 42 USC 2000cc(a)(1). A plaintiff must meet at least one of the following three jurisdictional tests in order to receive protection under the RLUIPA:

> "(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

> (C) *the substantial burden is imposed in the implementation of a land use regulation, or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.*" [*Shepherd Montessori, supra* at 327, 675 N.W.2d 271, quoting 42 USC 2000cc(a)(2) (emphasis added).]

At issue here is the third jurisdictional test. We conclude that the trial court did not err in concluding that defendants' denial of the request for rezoning constituted an individualized assessment within the meaning of the RLUIPA. Indeed, § 28-183 of the Jackson zoning ordinances within the municipal code provides an extensive procedure for a proposed zoning change; it includes such requirements as a written application, a hearing, and consideration by the city council. Moreover, it was clear that defendants followed the formal procedures of the zoning ordinance. Under the circumstances, the RLUIPA was applicable. See, e.g., *Shepherd Montessori, supra* at 328, 675 N.W.2d 271 (the township's evaluation and denial of the plaintiff's request for a use variance under the local zoning ordinance constituted an individualized assessment under 42 USC 2000cc [a][2][C]).

Defendants argue that the existence of an individualized assessment is a question of fact, not law, and that the trial court followed nonbinding legal authority in making its ruling. Defendants' arguments are not persuasive because (1) the trial

court, in effect, concluded that there was no genuine factual dispute that defendants' conduct constituted an individualized assessment under the RLUIPA and (2) regardless of the law on which the trial court relied, *Shepherd Montessori* is binding precedent and supports the trial court's decision. It is clear that the government in this case had " in place formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved." 42 USC 2000cc(a)(2)(C). Moreover, the government followed those procedures here. Reversal is unwarranted.

Defendants next argue that the trial court erred in ruling before trial, in connection with their motion for summary disposition, that there was no genuine factual dispute that defendants' zoning decision substantially burdened plaintiff's exercise of its religious beliefs.

"Once the jurisdictional requirements of [the] RLUIPA have been satisfied, [the] plaintiff must establish a substantial burden on religious exercise" *Shepherd Montessori, supra* at 329, (quotation marks omitted). To show that a governmental regulation imposes a substantial burden on a plaintiff's exercise of religion under the RLUIPA, the plaintiff must show that the regulation "must compel action or inaction with respect to [a] sincerely held belief...." *Id.* at 330. Inconvenience to the church falls short of a substantial burden. *Id.*

The RLUIPA defines "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious

belief." 42 USC 2000cc-5(7)(A). Additionally, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 USC 2000cc-5(7)(B). In determining whether plaintiff's operation of an assisted living apartment complex for the elderly and disabled constitutes an exercise of religion, *The Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals,* 215 Mich.App. 54, 544 N.W.2d 698 (1996), is instructive. In that case, The Jesus Center had been renting a two-story building in Farmington Hills since 1984 for traditional worship services, but also for a distribution point to supply food and clothing to needy persons. *Id.* at 55-56, 544 N.W.2d 698. In 1991, The Jesus Center sought to broaden its ministry by providing a shelter service to poor people and the homeless. *Id.* at 56, 544 N.W.2d 698. Farmington Hills denied the center's application for an "accessory use." *Id.* at 58, 544 N.W.2d 698. Arguing a violation of the Religious Freedom Restoration Act, 42 USC 2000bb *et seq.*, The Jesus Center contended that "operation of the shelter was part of its religious mission" and that "its provision of shelter services flows from its religious beliefs and is an exercise of those beliefs." *The Jesus Center, supra* at 58, 63-64, 544 N.W.2d 698. This Court agreed, reasoning that it is "not at liberty to question this position" and that "[i]t is not the job of the courts to second guess what activities are sufficiently religious to qualify for free exercise protection." *Id.* at 64, 544 N.W.2d 698 (citation and quotation marks omitted).

In the present case, Reverend Ira Combs, the pastor and founder of the Greater Bible Way Temple,

averred in his affidavit that providing housing to the elderly and disabled "is central" to plaintiff's ministry in Jackson and that this mission is acknowledged in plaintiff's letterhead. He explained further in the affidavit that this mission is given to the church through the teachings of Jesus Christ "and is a religious belief held by the Greater Bible Way Temple." Thus, the operation of an assisted living apartment complex for the elderly and disabled constitutes an exercise of religion and entails the use and construction of real property for the purpose of religious exercise. We conclude that the proposed project constitutes religious exercise within the meaning of the RLUIPA.

Plaintiff must additionally show that defendants' application of the zoning ordinance and refusal to rezone the area to R-3 constitutes the imposition of a substantial burden on plaintiff's religious exercise. See 42 USC 2000cc(a)(1). Because the use of land for the purpose of religious exercise is itself defined as religious exercise in 42 USC 2000cc-5(7)(B), defendants' denying plaintiff the use of the property as an apartment complex for elderly persons, as part of plaintiff's religious mission, constitutes the requisite substantial burden. See *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F Supp 2d 1083, 1091 (C.D.Cal., 2003) (the municipality's denial of the church's request for a conditional use permit to operate a church on property is a substantial burden because the use of land for religious exercise is itself religious exercise under the RLUIPA).

As discussed above, providing housing and

services to the community is not only part of plaintiff's mission as a church but is central to its religious faith. Combs's affidavit explains that plaintiff cannot afford to purchase different property and that it would lose an investment of over $150,000 if it cannot provide housing on the property in question. Moreover, because of services the church provides to the elderly, it is necessary for the apartment complex to be close to the church; thus, moving the project to another site would impose a substantial burden on plaintiff. The evidence additionally indicated that building single-family homes would not be economically feasible as an alternative for plaintiff.

Also, both Combs's affidavit and the affidavit of Doug Volkman, a realtor, indicated that there were no properties for sale near the church that are zoned R-3. In light of these facts, defendants' denial of the petition for rezoning would create an economic burden, unless property were available in an R-3 zone. Because no such property was available near the church in an R-3 zone, it would be a substantial burden for plaintiff to forgo developing the project. The government's implementation of the ordinance would, in effect, compel inaction with respect to plaintiff's sincerely held religious belief. *Shepherd Montessori, supra* at 330, 675 N.W.2d 271. Construing the RLUIPA in favor of a broad protection of religious exercise, as required by 42 USC 2000cc-3(g), the implementation of the ordinance constitutes a substantial burden on the

religious exercise of plaintiff.[1] Although there were differing opinions concerning the value of the subject property and the amount invested in the property, there was no dispute that the value of the property and plaintiff's investment are substantial. Moreover, there was no dispute that available property zoned R-3 near the church does not exist. Accordingly, the trial court did not err in its ruling with respect to the substantial burden issue.

Defendants next argue that the trial court erred in concluding after trial that defendants had not shown a compelling governmental interest for denying plaintiff's request for rezoning and in determining that the denial was not the least restrictive means of furthering such an interest.

We review a trial court's findings of fact for clear error. MCR 2.613(C); *Burkhardt v. Bailey,* 260 Mich.App. 636, 646-647, 680 N.W.2d 453 (2004). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Once a plaintiff has established the imposition of a substantial burden on its religious exercise, it is the government's obligation to demonstrate that its burdening action was "in furtherance of a compelling governmental interest" and "is the least restrictive

---

[1] We note that, in contrast to the situation in *Shepherd Montessori, supra* at 332-333, the parties here submitted documentary evidence on factors relevant to the substantial burden issue.

means of furthering" that interest. 42 USC § 2000cc(a)(1)(A)-(B). Defendants identify three potential compelling governmental interests in the context of this case: safety through traffic regulation, blight prevention, and urban sprawl prevention (or, phrased another way, promoting single-family neighborhoods).

With regard to traffic concerns, the record, at best, shows that rezoning would increase traffic but that congestion would occur only on special occasions, two or three times a year. Under these circumstances, we conclude that defendants have failed to show that the traffic-control interest is compelling.

Nor does the record support a finding of impending blight. At best, blight is a theoretical possibility. Defendants' own witness, Charles Reisdorf, testified that there is no evidence that rezoning the property to R-3 will cause blight to the area. Another witness, Charles Aymond, was not sure that the project would cause blight. While witness Dennis Diffenderfer testified that, in his experience, apartment developments in single-family neighborhoods ultimately contribute to blight, he did not know what the effect of the proposed project would be on this particular neighborhood. Ira Combs, Jr., testified that none of plaintiff's other housing projects in Jackson or other cities has destabilized the neighborhoods. Combs also testified that church apartment projects have a history of good management and that the projects are of high quality.

In light of the testimony, defendants have not demonstrated that blight prevention is a compelling governmental interest here. Even if blight prevention *were* a compelling governmental interest here, denial of rezoning was not the least restrictive means of furthering that interest. A compromised reduction in the size of the assisted living complex (a reduction to which plaintiff agreed at one point) would also achieve the desired result.

The control of urban sprawl is closely related to blight prevention as a governmental interest. Indeed, defendants' argument does not clearly differentiate between the two. The record does not portray the control of urban sprawl as a compelling governmental interest in this case. While Reisdorf testified that an incompatible structure (i.e., the proposed project) in the neighborhood may result in property owners failing to invest further in their property, he could only note the possibility. Moreover, while Aymond testified that, when the use of a single-family area is changed, instability results, he was not certain that destabilization would occur in this particular situation. Diffenderfer did testify that, in his experience, single-family, owner-occupied homes become rental properties when apartment complexes are introduced in the neighborhood. No evidence was offered, however, to show that the particular neighborhood in question will experience the loss of single-family, owner-occupied homes if the neighborhood is rezoned to R-3 and an assisted living complex is built there. Further, and significantly, even if defendants *had* established a compelling governmental interest in controlling urban sprawl, a less restrictive means of furthering that interest was

available, as described above. The trial court did not commit clear error in finding no compelling governmental interest present in this situation.

Defendants next argue that the section of the RLUIPA at issue in this case is unconstitutional. "This Court reviews constitutional questions de novo on appeal. Statutes are presumed to be constitutional, and every reasonable presumption must be made in favor of constitutionality. The party asserting the constitutional challenge has the burden of proof." *McDonald v. Grand Traverse Co. Election Comm.*, 255 Mich.App. 674, 679-680, 662 N.W.2d 804 (2003) (quotation marks omitted).

Defendants contend that the RLUIPA provisions at issue here exceed Congress's power under § 5 of the Fourteenth Amendment of the United States Constitution[2] because they essentially create new constitutional rights. Defendants' argument does not withstand analysis. As the United States Court of Appeals for the Eleventh Circuit has remarked, "In determining whether RLUIPA is an appropriate exercise of Congress's § 5 power," a court "must first determine whether Congress has the authority to enact legislation to enforce the rights guaranteed by the First Amendment." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237 (C.A.11, 2004). The United States Supreme Court has determined that Congress has that power.

---

[2] Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Am. XIV, § 5.

City of Boerne v. Flores, 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The *Midrash Sephardi* court explained that the second inquiry "is whether [the] RLUIPA 'enforces' a constitutional right without substantively altering that right." *Midrash Sephardi, supra* at 1237. This question is answered "by evaluating whether the legislation is congruent and proportional to the injury to be prevented or remedied." *Id.;* see also *Boerne, supra* at 520, 117 S.Ct. 2157. "[I]f RLUIPA merely codifies existing constitutional principles, it is an acceptable use of Congress's § 5 remedial tool." *Midrash Sephardi, supra* at 1237.The *Midrash Sephardi* court found that documentation of " widespread discrimination against religious institutions" supports the conclusion "that RLUIPA remedies and prevents discriminatory land use regulations." *Id.* at 1239. Accordingly, the court concluded that the RLUIPA is an appropriate use of Congress's authority under § 5 of the Fourteenth Amendment. *Id.* at 1239-1240. The reasoning of *Midrash Sephardi* is sound, and we therefore find no § 5 violation in this case. The RLUIPA is "congruent and proportional to the injury to be prevented or remedied." *Id.* at 1237.

Defendants also argue that the portion of the RLUIPA at issue here violates the Establishment Clause of the First Amendment of the United States Constitution[3] by forcing municipalities to endorse religion. Several federal circuit courts of appeal have

---

[3] The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion..." U.S. Const. Am. I.

held that various portions of the RLUIPA do *not* violate the Establishment Clause. See, e.g., *Midrash Sephardi, supra* at 1240-1242,*Madison v. Riter,* 355 F.3d 310, 313-320 (C.A.4, 2003), *Charles v. Verhagen,* 348 F.3d 601, 610-611 (C.A.7, 2003), and *Mayweathers v. Newland,* 314 F.3d 1062, 1068-1069 (C.A.9, 2002).

Moreover, and significantly, the United States Supreme Court has issued an opinion regarding the constitutionality of the RLUIPA. In *Cutter v. Wilkinson,* 544 U.S. 709, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005), the Court ruled that § 3[4] of the RLUIPA does not violate the Establishment Clause "because it alleviates exceptional government-created burdens on private religious exercise." *Id.* at ----, 125 S.Ct. at 2121. The Court further indicated that it had "no cause to believe that [the] RLUIPA would not be applied in an appropriately balanced way," and the Court emphasized that the RLUIPA "does not differentiate among bona fide faiths." *Id.* at ----, 125 S.Ct. at 2123.

While *Cutter* dealt with § 3 of the RLUIPA and not with the land-use portion of the RLUIPA at issue in this case, the holding of *Cutter* is nonetheless applicable. Indeed, in *United States v. Maui Co.,* 298 F Supp 2d 1010, 1014 (D.Hawai'i, 2003), the district

---

[4] The RLUIPA states, in part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." See 42 USC 2000cc-1(a)(1) and (2).

court listed several cases that found no Establishment Clause violation with regard to § 3 of the RLUIPA. The court then stated:

> [T]here is little reason to find differently in the land use context. The Establishment Clause arguments are essentially the same. If [the] RLUIPA does not constitute an impermissible advancement of religion for institutionalized persons as against prisons, it would not seem to do so for non-institutionalized persons as against municipalities in land use decisions. The Court therefore rules consistently with Ninth Circuit precedent in a prison context and finds that [the] RLUIPA does not violate the Establishment Clause in a land use context. [*Maui Co, supra* at 1015.]

In light of *Cutter*, *Maui Co.*, and other federal precedents, we conclude that the portion of the RLUIPA at issue here does not violate the Establishment Clause of the United States Constitution.

Defendants next argue that the trial court erred in granting plaintiff an award of attorney fees because plaintiff failed to make a demand for attorney fees and costs in its complaint. Whether a party has waived its claim to attorney fees under a statute or court rule is a question of law that we review de novo. See *Solution Source, Inc. v. LPR Associates Limited Partnership,* 252 Mich.App. 368, 377, 652 N.W.2d 474 (2002).

Attorney's fees may be awarded to the

prevailing party in RLUIPA cases, in the court's discretion, under the authority of 42 USC 1988(b). Citing federal case law, defendants argue that plaintiff has waived its right to those fees because (1) plaintiff failed to list its claim for attorney fees and costs in its complaint and otherwise failed to file an amended complaint containing such a request and (2) plaintiff failed to incorporate its claim for attorney fees and costs into the various drafts of the final order.

However, MCR 2.601(A) states: "Except as provided in subrule (B), every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in his or her pleadings." Therefore, the trial court properly exercised its discretion in awarding the fees. The issue of attorney fees was briefed by the parties, a hearing on the issue took place, and the trial court's written opinion awarding the fees shows that it thoroughly considered the matter. No error requiring reversal occurred.

Defendants contend that the court should not have awarded attorney fees to plaintiff because the late presentment of the issue prejudiced defendants. In their statement of questions presented for appeal, defendants suggest that the court's award of attorney fees, under the circumstances of the case, essentially denied defendants due process of law. However, defendants offer no supporting authority for this argument. "A bald assertion without supporting authority precludes examination of [an] issue." *Impullitti v. Impullitti*, 163 Mich.App. 507, 512, 415

N.W.2d 261 (1987). To the extent that defendants rely on *Van Pembrook v. Zero Mfg. Co.*, 146 Mich.App. 87, 380 N.W.2d 60 (1985), to support their due process argument, we note that that case does not concern due process and attorney fees. Rather, *Van Pembrook* indicated that, because the plaintiff's complaint for breach of contract did not aver special damages, and because the damages did not flow naturally from the alleged breach, the complaint "did not reasonably inform defendant of these types of damages...." *Id.* at 107, 380 N.W.2d 60. Here, the award of attorney fees to the prevailing party was a possibility from the commencement of this RLUIPA lawsuit under the authority of 42 USC 1988(b). Thus, defendants knew or should have known of the possibility of such an award. Reversal is unwarranted.

Both cases are affirmed.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood
/s/ Bill Schuette

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

THE GREATER BIBLE WAY TEMPLE OF JACKSON, a Michigan ecclesiastical Corporation,

Plaintiff/Appellant,

vs.

CITY OF JACKSON; JACKSON PLANNING COMMISSION; AND JACKSON CITY COUNCIL,

Defendants/Appellees.

File No. 01-003614-AS

Honorable Chad C. Schmucker

_____/

Brian W. Surgener (P46229)
Attorney for Plaintiff/Appellant
Hubbard, Fox, Thomas, White
& Bengtson, P.C.
5801 W. Michigan Avenue
P.O. Box 80857
Lansing, Michigan 48908-0857
(517) 886-7176 (Phone)
(517) 886-1080 (Fax)

Julius A. Giglio (P32022)
John Stanoski (P24548)
Attorneys for Defendants/Appellees
City of Jackson
161 W. Michigan Avenue
Jackson, Michigan 49201-1303
(517) 788-4050 (Phone)
(517) 788-4059 (Fax)

_____/

OPINION

Plaintiff claims that the Defendant violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) in denying their request for rezoning. Both sides have moved for Summary Disposition.

Facts

Plaintiff's Church is in the City of Jackson in a R-1 (single family residential) zoning district. Plaintiff wants to build and develop an apartment building for the elderly and disabled next to the Church property. The Defendant denied Plaintiff's request for rezoning.

Defendant claims entitlement to summary disposition for the following reasons:

A. Because Plaintiff cannot show they were subjected to "an individualized assessment."
B. Because Plaintiff cannot show that the Defendant has substantially burdened Plaintiff's free exercise of religion.

C. Because Defendant has a compelling governmental interest in denying the Plaintiff's request for rezoning.

Similarly, the Church has asked that Summary Disposition be granted in their favor because the City has imposed a substantial burden on the church in violation of RUIPSA [sic] and because the City has failed to show it has taken the least restricted [sic] means of protecting a compelling governmental interest.

A.

Was the City of Jackson's denial of the request for rezoning an "individualized assessment?"

This issue is discussed in the recent case of *Cottonwood Christian Center v The City of Cyprus*, 218 F. Supp. 2d 1203 (2002) in which the court quotes the following language with approval:

No one contests that zoning ordinances must by their nature impose individual assessment regiments. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore of necessity different from laws of general applicability, which do not admit to exceptions on free exercised [sic] grounds. Freedom Baptist Church, of Delaware County vs. TP. of Middletown, 204 F. Supp. 2d 857, 868 (Ed Pa. 2002).

There is no question that the City of Jackson's review of Plaintiff's request for rezoning was an individualized assessment. Summary Disposition can be denied as a matter of law, MCR 2.116(C) (8). The City of Jackson's request for Summary Disposition on this basis is denied.

B.

Has the Defendant substantially burdened the Plaintiff's free exercise of religion?

Part of Plaintiff's religious mission is to provide housing for the disabled and elderly. Defendant does not question the religious mission of the Plaintiff in any way. However, the Defendant notes that the Plaintiff already is involved in providing housing and that is being conducted at many locations in the State of Michigan. Some are in the City of Jackson. some are in Jackson County and some are in other counties. None of the locations are adjacent to this Church. Plaintiff acknowledges the same.

However, Plaintiff notes that the Church provides meals, religious activities, social activities, and related services such as a religious bookstore. There are obvious financial, logistic, and organizational advantages to having Church sponsored apartments in close proximity to the main Church building.

There are various areas in the City of Jackson that are zoned for apartments. Some of these areas are relatively close to the main Church building.

However, at this time none of those properties are for sale.

On these uncontested facts I find that the Defendants zoning decision has substantially burdened this Church's free exercise of their religious beliefs. They have not completely prevented the exercise of their religious beliefs because obviously this Church has already provided housing that is not adjacent to its Church. However, this is not a small or minimal burden, it is a substantial burden.

In *Jesus Center* vs. *Farmington Hills Zoning Board of Appeals*, 215 Mich App 54, 544 NW 2d 698 (1996) the City of Farmington Hills suggested the Jesus Center relocated to an area to [sic] where a homeless shelter would be allowed. The Court noted that the Jesus Center had been at the current location for years and relocating would be a substantial burden. The Greater Bible Way Temple of Jackson is not a newcomer to this neighborhood. They have made a substantial investment in the area [sic] many years. The City is putting the Church in either a position of relocating its entire operation if they want apartments adjacent to the Church or having apartments that [sic] at a different location. Both of these choices impose a substantial burden on the Church.

The City of Jackson's Motion for Summary Disposition on the issue of substantial burden is denied. Plaintiff, Church's Motion for Summary Disposition on the issue of substantial burden is granted pursuant to MCR 2.116 (C)(10), since there is no material issue of fact and based on the

undisputed facts I find that the zoning decision has substantially burdened the Church's free exercise of their religious beliefs.

C.

Does the City of Jackson have a compelling governmental interest in preventing the construction of these apartments for the elderly and handicapped?

There is no question that the City has an interest in enforcing zoning in general. If the City abandoned its commitment to zoning we would have chaos.

However, from the information that has been provided to the court about the rezoning request and process it appears that the City took the position that The Greater Bible Way Temple of Jackson, should be treated the same way as a private developer or a non-profit, but non-religious group. The gravamen of this complaint is not that the City discriminated against this Church in treating them unfairly as opposed to other private corporations or non-profit organizations. The Church claims the City failed to recognize that they have certain obligations under the Religious Land Use of [sic] Institutionalized Persons Act.

For example, there is no question that Farmington Hills could have denied a zoning request [sic] a non-religious group that wanted to start a homeless shelter. If the request had come from Goodwill Industries, the YMCA, the Optimists, the

88

MOTION FILED

MAR 15 2008

(3)

No. 07-1080

IN THE

Supreme Court of the United States

THE GREATER BIBLE WAY TEMPLE OF JACKSON,
Petitioner,

v.

THE CITY OF JACKSON, *ET AL.*
Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF GRACE COMMUNITY CHURCH, LIGHTHOUSE COMMUNITY CHURCH OF GOD, THE MICHIGAN DISTRICT OF THE CHURCH OF GOD OF CLEVELAND, TENNESSEE, AND NORTHRIDGE CHURCH

DANIEL P. DALTON
Counsel of Record
TOMKIW DALTON, PLC
321 Williams Street
Royal Oak, MI 48067
Phone: (248) 591-7000
ddalton@tomkiwdalton.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 5

I. THE *GREATER BIBLE WAY* DECISION HAS RESULTED IN DENYING A SIGNIFICANT NEED OF PROVIDING SENIOR AND DISABLED HOUSING TO A POOR COMMUNITY, COUNTY, AND DEPRESSED STATE 5

II. IN ADDITION TO THE QUESTIONS PRESENTED BY THE PETITIONERS, THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE STATE AND FEDERAL COURTS REGARDING THE MEANING AND CONSEQUENCE OF THE TERM "SUBSTANTIAL BURDEN" 10

III. THE EXPERIENCE OF *AMICI* UNDER RLUIPA HAS CONFIRMED THE EVIDENCE PRESENTED TO CONGRESS 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 661-663 (10th Cir., 2006) 11

Guru Nanak Sikh Society v. County of Sutter, 456 F.3d 978, 989 (9th Cir., 2006) 11

Saints Constantine and Helen Greek Orthodox v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (Posner, J) 11

San Remo Hotel LP v. City of San Francisco, 545 US 323, 341 (2005) 12

Spratt v. Rhode Island Dept. of Corrections, 482 F.3d 33, 38 (1st Cit., 2007) 11

Westchester Day School v. Village of Mamaronek, 504 F.3d 338, 351 (2nd Cir., 2007) 11

Statutes

28 U.S.C. § 1783 7

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc 2

Other Authorities

Citizens Research Council of Michigan, *Regional Approaches to Economic Development*, February 2007, Report 345; http://www.crcmich.org/PUBLICAT/2000s/2007/rpt345.pdf 7

Louis Aguilar, "Economist: Michigan in fourth year recession," *The Detroit News* (Jan. 30, 2008) 4

Patricia Butler, "Senior Housing - The Changing Landscape," *available at*

http://www.seniorcitizensguide.com/detroit/articles/changing-landscape.htm 5
Senior Living: Beyond the Nursing Home. American Demographics, November 2006 8
"The Maturing of America: Getting Communities on Track for an Aging Population," http://seniorliving.about.com/od/babyboomers/a/aging_population.htm: 6
U.S. *Census* Bureau, American Fact Finder, http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_SF1_U_GCTP5_ST7&format=ST-7&_box_head_nbr=GCT-P5&ds_name=DEC_2000_SF1_U&geo_id=04000US26..... 7
U.S. Department of Health and Human Services, Medicare Website, Nursing Home finder, Jackson County, Michigan, http://www.medicare.gov/NHCompare/Include/DataSection/Questions/HomeSelect.asp?State=MI0%7CMichigan&County=26075%7CJACKSON&Type=County&pagelist=Home&dest=NAV%7CHome%7CSearch%7CHomeSelect%7CSearchCriteria&version=default&browser=IE%7C7%7CWinXP&language=English&CookiesEnabledStatus=True&search_dest=Nav%7CHome%7CSearch%7CSearchCriteria&StateAbbr=MI&StateName=Michigan..... 7

Rules

Rule 37.2..... 2

IN THE

Supreme Court of the United States

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Petitioner,

v.

THE CITY OF JACKSON, *ET AL.*,

Respondents.

No. 07-1080

On Petition for a Writ of Certiorari to the Michigan Supreme Court

---

MOTION OF CHURCH OF GOD (CLEVELAND, TENNESSEE), GRACE COMMUNITY CHURCH, LIGHTHOUSE COMMUNITY CHURCH OF GOD AND NORTHRIDGE CHURCH FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae the Michigan District of the Church of God (Cleveland, Tennessee), Grace Community Church, Lighthouse Community Church of God and NorthRidge Church respectfully request leave of this Court of file the following brief

in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

Petitioner has granted its consent to the filing of this brief. However, Respondents did not consent to *amici's* request of March 4, 2008, necessitating the Court's consideration of this motion.

The Church of God is a religious society organized under and pursuant to the laws of the State of Tennessee as an ecclesiastical non-profit organization. With more than 6 million members worldwide, the Church of God is the second-largest Pentecostal denomination in the world. The interest of the Michigan District Church of God is in protecting the ability of its more than 150 churches in the State of Michigan to worship and minister freely wherever they may be located. One of its Michigan churches is Living Water Church of God, located in Meridian Township, Michigan, whose petition for a writ of certiorari is now pending before the Court.

Grace Community Church ("Grace") was originally established in 1996 in New Haven, Michigan, to provide a place of worship for those who "just didn't fit in" to a normal church setting. The primary purpose of Grace is to assist men and women who have turned to alcohol, drugs, go into debt or even try to commit suicide in an effort to hide what they view as the inadequacies of their existence. Grace provides counseling and a

supportive environment to help those who need guidance after they leave a treatment facility. Grace is not a treatment facility, but rather simply an alcohol and drug free living environment which provides an opportunity for recovering individuals to live as a family unit with on-site counselors. Grace was originally granted a permit to operate a community center in Lenox Township, Michigan, but the township later revoked the permit. Grace has relied on RLUIPA to vindicate its rights.

Lighthouse Community Church of God ("Lighthouse") is a small historic African-American church presently located in Redford Township, Michigan. It ministers to, among others, the elderly and disabled. Lighthouse was involved in a landmark RLUIPA lawsuit involving the City of Southfield, Michigan. As Lighthouse felt the direct effect of discrimination by a large City and ultimately won a protracted legal battle, the Church has a continued interest in assuring that the law is equally applied to all churches and religious organizations within Michigan.

NorthRidge Church ("NorthRidge") is a large Christian non-denominational church located in Plymouth Township, Michigan, serving the needs of many in the southeastern Michigan area. NorthRidge provides a place for Christians to worship together and pray and engages in many ministries, including ministries to the elderly and disabled. NorthRidge is currently involved in a contentious RLUIPA case regarding its use of its

property in Plymouth Township, Michigan to enable it to implement plans that are essential to its religious mission.

The unique perspectives and arguments set forth in the brief following demonstrate that the *amici* will be able to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties" that will be "of considerable help to the Court." Supreme Court Rule 37.1.[1]

For the foregoing reasons, the motion for leave to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

DANIEL P. DALTON
Counsel of Record
TOMKIW DALTON, PLC
321 Williams Street
Royal Oak, MI 48067
Counsel for Amici Curiae

March 14, 2008

[1] The author of this brief has litigated, lectured, and published on issues related to RLUIPA and land use and zoning throughout the United States. He is co-chair of the of the American Bar Association, State and Local Law Section, RLUIPA Committee and Government Operations Committee, a life member and fellow of the American Bar Foundation, a member of both the American and Michigan Planning Association. The arguments presented here are not attributable to those organizations.

IN THE

Supreme Court of the United States

THE GREATER BIBLE WAY TEMPLE OF JACKSON,

Petitioner,

v.

THE CITY OF JACKSON, *ET AL.*,

Respondents.

No. 07-1080

On Petition for a Writ of Certiorari to the Michigan Supreme Court

---

BRIEF *AMICI CURIAE* OF THE MICHIGAN DISTRICT OF THE CHURCH OF GOD (CLEVELAND, TENNESSEE), GRACE COMMUNITY CHURCH, LIGHTHOUSE COMMUNITY CHURCH OF GOD AND NORTHRIDGE CHURCH

The Church of God (Cleveland, Tennessee), Grace Community Church, Lighthouse Community Church of God, and NorthRidge Church submit this

brief *amicus curiae* in support of Petitioner pursuant to Rule 37.2 of this Court.[2]

Amici believe that their experiences in this area of the law will enable them to aid the Court in understanding the extent of division among Michigan State and Federal Courts, and put a face on the human cost of the *Greater Bible Way* decision, for purposes of deciding whether to grant the writ in this case.

SUMMARY OF THE ARGUMENT

The term "substantial burden" in RLUIPA has confused and divided lower courts since it first appeared in the Act. The legislative history of the Act reveals that Congress made a deliberate choice not to define "substantial burden," but rather allow courts to utilize that definition from this Court's jurisprudence starting with *Sherbert v. Verner*, 374 U.S. 398 (1963). Religious groups – especially religious minorities or those associated with racial or ethnic minorities – have paid a heavy price for that confusion, especially in land-use permitting decisions.

---

[2]No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their members made any monetary contributions to the preparation or submission of this brief.

The confusion surrounds the following questions. First, in general, what is a "substantial burden," and in particular, does it include discretionary systems for deciding whether to grant zoning permits to religiously motivated land uses? Second, there is a split in authority in Michigan as to what a "substantial burden" is, or is not. The Michigan Supreme Court holding in *Greater Bible Way* that the land use denial did not substantially burden the church is in direct conflict with decisions from the United States Court of Appeals, including the Sixth Circuit's recent decision in *Living Water Church of God v. Charter Township of Meridian,* ____ F.3d ___, (2007 WL 4322157) (6th Cir., Dec. 13, 2007) which is also the subject of a petition for writ of certiorari.

These questions have had a direct and substantial impact on churches and other houses of worship in the City of Jackson, Jackson County and the state of Michigan as a whole. As set forth in this brief, the City of Jackson, Jackson County and the State of Michigan are in the midst of a single state recession.[3] Moreover, state funding has been dramatically cut to local governments and has been eliminated for the most part for counties. There has been no local government building of senior housing.

---

[3]Louis Aguilar, "Economist: Michigan in fourth year recession," *The Detroit News* (Jan. 30, 2008).

At the same time, Michigan's aging population continues to increase. According to recent trends, more than one in five individuals from the State of Michigan will be entering their senior years. There is, therefore, a real need within the State of Michigan, the County of Jackson, and the City of Jackson for someone to meet this need.

Finally, because of the depressed state of the local economy, Michigan is a hotbed of religious land use litigation. The very first RLUIPA case arose out of Grand Haven, Michigan. Since then, Michigan's municipalities have taken a hard-line approach to any church attempting to locate, expand or use property within their borders, all in an attempt to retain property tax dollars.

In sum, given the confusion regarding the term "substantial burden," and the exceptionally important real world effects of this confusion within the State of Michigan, along with Michigan's anti-RLUIPA sentiment, represents a strong reason to grant the writ of certiorari in this case.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE GREATER *BIBLE WAY* DECISION HAS RESULTED IN DENYING A SIGNIFICANT NEED OF PROVIDING SENIOR AND DISABLED HOUSING TO A POOR COMMUNITY, COUNTY, AND DEPRESSED STATE.

With the oldest baby boomers turning 60 in 2006, there will be a drastic increase in the number of people over 65 in 2010 when the latest census will be conducted. The number of people over 65 is predicted to grow until 2030, where one in five Americans will be over 65 years old.[4] The number of seniors over 65 will soar to 71.5 million people by 2030, a mere 20 years from now, twice the number in 2000 according to *"The Maturing of America: Getting Communities on Track for an Aging Population,"* published by the National Association of Area Agencies on Aging (n4a) and funded by the MetLife Foundation. Sandy Markwood, the NAAAA CEO calls the report a "wake-up call" and recommends that communities and counties begin

---

[4] *See* Patricia Butler, "Senior Housing - The Changing Landscape," *available at* http://www.seniorcitizensguide.com/detroit/articles/changing-landscape.htm

planning to address the major shift in demographics:[5]

> "To respond to the rapid rise in their aging population, communities will need to provide larger street signage, ***accessible housing***, age appropriate fitness programs, as well as lifelong learning and job re-training opportunities. Although targeted to an aging population, these services would improve the quality of life for citizens of all ages."

The growth in the number of senior citizens is expected to be accompanied by a dramatic increase in the senior-housing marking. According to the NIC, the senior housing market will more than triple, growing from an estimated 1.26 billion in 2005 to 4.9 billion by 2030.[7] A problem with the exponential rise in senior citizens is providing care at low cost. As seniors live longer, their funds will be stretched to the limit.

There is no dispute that Michigan is in a single state recession. The once proud and economically strong state associated with the automobile industry has been increasingly

---

[5]Markwood, "The Maturing of America: Getting Communities on Track for an Aging Population," http://seniorliving.about.com/od/babyboomers/a/aging_population.htm:

[6] Id.

[7] Id.

economically devastated over the past 50 years.[8] The City of Jackson has been caught in a downward spiral of population loss, job loss and overall loss of community.[9] State, county and local governments have not been able to step up to the plate to assist its citizens in providing basic human needs.[10] Those human needs include housing for its seniors – one of the most important segments of this community.

Within the City of Jackson, 11.9% of its residents, amounting to 4,183 people, are over the age of 65.[11] To take of the aging population, the City of Jackson has a total of six senior assisted care homes with a total number of 599 beds.[12]

---

[8] Citizens Research Council of Michigan, *Regional Approaches to Economic Development,* February 2007, Report 345; http://www.crcmich.org/PUBLICAT/2000s/2007/rpt345.pdf

[9] Id.

[10] Id.

[11] U.S. Census Bureau, American Fact Finder, http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_SF1_U_GCTP5_ST7&format=ST-7&_box_head_nbr=GCT-P5&ds_name=DEC_2000_SF1_U&geo_id=04000US26

[12] U.S. Department of Health and Human Services, Medicare Website, Nursing Home finder, Jackson County, Michigan, http://www.medicare.gov/NHCompare/Include/DataSection/Questions/HomeSelect.asp?State=MI0%7C

Jackson County has seven nursing homes; four are profit, two are non-profit, and one is state owned.[13] Six of these facilities are located in the City of Jackson. None of the facilities are owned by the City of Jackson or Jackson County. More significantly, none have any religious affiliation to them. In the state of Michigan, there are less than 20 who have religious affiliations.[14]

In the case at hand, a Church has stepped up to the plate to take care of a constituency that the community has essentially ignored. Greater Bible Way is ready, willing and able to build senior housing for members of its congregation and members of its community. There is a demonstrated need for this use. As the bishop noted in his affidavit that is set forth in the record, these individuals will be given not only living assistance, but also a community to rely on, and religious assistance, instruction and spiritual guidance. To push away a public benefit, that is taking care of senior citizens without cost to the community at large, is simply ludicrous.

Michigan&County=26075%7CJACKSON&Type=County&pagelist=Home&dest=NAV%7CHome%7CSearch%7CHomeSelect%7CSearchCriteria&version=default&browser=IE%7C7%7CWinXP&language=English&CookiesEnabledStatus=True&search_dest=Nav%7CHome%7CSearch%7CSearchCriteria&StateAbbr=MI&StateName=Michigan

[13] Id.

[14] Id.

The location of the senior housing next to the Church is both a way for the Church to create a community to help seniors and disabled people and a necessary part of the religious nature of its ministry. The Michigan Supreme Court has effectively told the Church that it cannot continue its ministry in the location it desires because the City's interest trumps that of the Church. In other words, the Court focused on the needs of the City (preserving its tax base) as opposed to the religious needs of the Church, as Congress required in passing RLUIPA. When passing RLUIPA, Congress focused on a government's conduct in barring ministry to determine if a claim was present, not on the issue of whether a Church was totally barred from a community.

Michigan is a unique state in that while charitable giving to religious organizations has increased, (even though the state leads the nation in the highest rate of unemployment, foreclosures of homes and a protracted recession), communities within the state of Michigan are openly contemptuous toward religious entities and organizations. The contempt can barely be masked by these municipalities who are refusing to provide services and take care of those who are in need. These clearly are heroic leaders of their communities that are simply ignored. Congress clearly was acting to stop this harm when it enacted RLUIPA in 2000.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE STATE AND FEDERAL COURTS REGARDING THE MEANING AND CONSEQUENCE OF THE TERM "SUBSTANTIAL BURDEN."

As noted in the Petition, the Michigan Supreme Court's decision in *Greater Bible Way* deepens the three-way split among the Federal Courts of Appeals and State Supreme Courts over RLUIPA's substantial burden standard. In *Greater Bible Way*, Michigan's Supreme Court has turned the words "substantial burden" into a phrase meaning a complete and total exclusion of religious activity within the city. Essentially, the Court has said that if *Greater Bible Way* can theoretically build senior apartments in a single location somewhere in the City of Jackson, then no substantial burden exists. 733 N.W. 2d at 750.

On the other hand, the Sixth Circuit's approach in *Living Water Church of God v. Meridian Township*, ___ F.3d ___ at ____, 2007 WL 4322157 defines a substantial burden as government action that "places substantial pressure on the claimant that violates its religious beliefs or effectively bars a church from using its property in the exercise of religious." Under this standard, the substantial burden is something more than exclusion from a particular piece of

property, but something less than exclusion from the entire jurisdiction.

The better approach is advocated by Petitioner, as set forth by Judge Posner in *Saints Constantine and Helen Greek Orthodox v. City of New Berlin,* 396 F.3d 895 (7th Cir. 2005) (Posner, J). Judge Posner focused more on the government's treatment of the religious applicant than on any resulted coercion or on the availability of alternatives. The Court held that a substantial burden may result from the "delay, uncertainty and expense" of multiple land use applications. *Constantine*, 396 F.3d at 901. This standard, which was rejected by the Michigan Supreme Court in G*reater Bible Way*, has been adopted by the Second, Seventh and Ninth Circuits, and approved in dicta in the First and Tenth Circuits.[15]

As a result of the decision of the Michigan Supreme Court in *Greater Bible Way*, litigants who file suit in Michigan state courts will be subject to a completely different standard (total exclusion standard) than those that file in Federal Courts using the *Living Water* standard, (coercion test).

---

[15]See *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 989 (9th Cir., 2006); *Westchester Day School v. Village of Mamaronek*, 504 F.3d 338, 351 (2nd Cir., 2007); *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33, 38 (1st Cit., 2007); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661-663 (10th Cir., 2006).

RLUIPA plaintiffs will have a strong incentive to bring their claims in federal court rather than state court, although the *Living Water* standard is not much better than the Michigan Supreme Court's standard. Similarly, since RLUIPA is sometimes raised as an affirmative defense in state court proceedings, plaintiffs seeking to avoid the defense would bring their lawsuits in state court to effectively bar the claim. If the matter did get to federal court, thereafter it would be barred from litigating the claim under principles of collateral estoppel as federal courts must give prior state court judgments the same affect those judgments would be given in the courts of the rendering state. 28 U.S.C. § 1783; *San Remo Hotel LP v. City of San Francisco,* 545 US 323, 341 (2005). Thus, if either party asserts federal issues in its complaint to affirmative defenses at the state court level, it could not continue those claims for subsequent litigation in the federal court. *Id.*

In sum, the Court of Appeals and state Supreme Courts are all over the page when it comes to the meaning and legal consequence of the term "substantial burden" within this Court's RLUIPA jurisprudence. That is more than reason enough to grant the writ of certiorari in this particular case, which raises those questions and exemplifies that confusion.

III. THE EXPERIENCE OF *AMICI* UNDER RLUIPA HAS CONFIRMED THE CLEAR AND CONVINCING EVIDENCE PRESENTED TO CONGRESS OF RELIGIOUS DISCRIMINATION

Amici have participated frequently and directly in disputes over the discretionary denial of zoning permits used for religious exercise. Their experience since the passage of RLUIPA confirms that those denials occur frequently, often imposing severe restrictions on religious exercise, often for vague or otherwise dubious reasons, and often with expressions of animus which, unfortunately, are insufficient alone to make out a claim of discrimination. This experience underscores that this Court needs to clear up the confusion regarding whether "substantial burden" should be construed to cover fact patterns like this one, because these are concrete and emerging consequences in the lives of thousands, if not millions, of Americans.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

DANIEL P. DALTON
Counsel of Record
TOMKIW DALTON, PLC
321 Williams Street
Royal Oak, MI 48067
Phone: (248) 591-7000

March 14, 2008

Counsel for Amici Curiae

Elks or the Boy Scouts, then Farmington Hills would have been well within their rights to deny the request. Indeed, the City of Jackson unquestionably could have denied this rezoning request if it had been made by a non-religious group.

The City of Jackson must be concerned with land use in their city. But there does not appear to have been any real effort to establish what their compelling governmental interests are and whether those can be accommodated. The City cannot simply state that the compelling governmental interest is established by the mere fact of zoning. Other less restrictive means should be considered as required under RUIPSA [sic] to satisfy whatever compelling interest the City has.

I am unable to grant summary disposition on this issue. This will require a factual record. At trial, the City of Jackson will have the burden of both establishing the compelling governmental interests and that is [sic] use the least restrictive means to achieve those interests, *Cheeman v Thompson*, 67 F3d 883, 885 (9th Cir 1995).

The Defendant's Motion for Summary Disposition is denied in total. Plaintiff's Motion for Summary Disposition is granted in part.

Trial is scheduled for Monday, May 12, 2003 at 9:30 a.m. There will be a final Pre-Trial Wednesday, May 7, 2003 at 10:00 a.m.

Dated: February 25, 2003

/s/ Chad C. Schmucker
Chad C. Schmucker, Circuit Court Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON

THE GREATER BIBLE WAY TEMPLE OF JACKSON, a Michigan ecclesiastical corporation,

Plaintiff/Appellant,

v

CITY OF JACKSON; JACKSON PLANNING COMMISSION; AND JACKSON CITY COUNCIL,

Defendants/Appellees.

HONORABLE CHAD C. SCHMUCKER

FILE NO: 01-3614-AS

BRIAN W. SURGENER (P46229)
Attorney for Plaintiff
HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.
5801 W. Michigan Ave., P.O. Box 80857
Lansing, MI 48908-0857
PH: (517) 886-7176
FAX: (517) 886-1080

JULIUS A. GIGLIO (P32022)
JOHN W. STANOWSKI (P24548)
Attorney for Defendants
City of Jackson, et al.
161 W. Michigan Avenue
Jackson, MI 49201-1303
(517) 788-4050

FINAL ORDER

At a session of said Court, held in its Courtroom in the City of Jackson, County of Jackson, State of Michigan, on the 3 [sic] day of Sept [sic], 2003.

PRESENT: HONORABLE CHAD C. SCHMUCKER, Circuit Court Judge

This matter having come before the Court after proofs submitted by Plaintiff and Defendants on limited issues on July 14 and 15, 2003, and the Court having issued a ruling on the record in open Court on July 15, 2003, and the Court having heard oral arguments on Defendants' Motion for Relief from Judgment or Order Dated July 29, 2003, and the Court being fully advised in the matter;

IT IS HEREBY ORDERED that the Defendant's Motion for Relief from Judgment of Order dated July 29, 2003 is granted and the Court Order dated July 29, 2003 is vacated for the reasons stated on the record;

IT IS HEREBY FURTHER ORDERED that this Court's prior opinion dated February 25, 2003, is reaffirmed and is a final order for purposes of MCR 7.207(7)(a)(i);

IT IS HEREBY FURTHER ORDERED that the Defendants have imposed or implemented a land use regulation in a manner that imposes a substantial burden on the religious exercise of Plaintiff;

IT IS HEREBY FURTHER ORDERED that the Defendants have failed to demonstrate that the imposition of a substantial burden on the religious

exercise of Plaintiff was in the furtherance of a compelling governmental interest;

IT IS HEREBY FURTHER ORDERED that the Defendants have violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC Section 2000cc, *et seq.*, for those reasons stated on the record;

IT IS HEREBY FURTHER ORDERED that this Final Order applies to lots 62 through 66, and lots 89 through 92, inclusively, of Hillside Subdivision, as recorded in Liber 4 of Plats, Page 24, of the Jackson County Records[1];

IT IS HEREBY FURTHER ORDERED that the Defendants, their officers, agents servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are

---

[1] Hereinafter referred to as "said lots."

enjoined from interfering, stopping or preventing Plaintiff from building the originally proposed housing plan of 32 units, or any plan with a lesser burden, on said lots that comports with R-3 zoning as defined in the Jackson Coty [sic] Code;

IT IS HEREBY FURTHER ORDERED that the Defendants, their officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are enjoined from implementing or imposing a land use regulation in a manner that imposes a substantial burden on the religious exercise of Plaintiff in its development and use of said lots, absent compelling governmental interests;

IT IS HEREBY FURTHER ORDERED that this Order is a final order for purposes of MCR 7.202(7)(a)(i);

IT IS HEREBY FURTHER ORDERED that Plaintiff is the prevailing party;

IT IS HEREBY FURTHER ORDERED that this Court shall retain jurisdiction to enforce this Order.

Dated: _____, 2003

/s/ Chad C. Schmucker
Chad C. Schmucker, Circuit Judge

9/3/03

Michigan Supreme Court

Order

September 18, 2007

Rehearing No. 537

5 November 2006

130194
130196

SC: 130194, 130196
COA: 250863, 255966
Jackson CC: 01-003614-AS

THE GREATER BIBLE WAY TEMPLE OF JACKSON,
Plaintiff-Appellee,

v

CITY OF JACKSON, JACKSON PLANNING COMMISSION, and JACKSON CITY COUNCIL,
Defendants-Appellants.

In this cause, a motion for rehearing is considered and it is DENIED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 18, 2007 /s/ Corbin R. Davis

106th CONGRESS

2d Session

S. 2869

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended--

(1) by inserting `the Religious Land Use and Institutionalized Persons Act of 2000,' after `Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not

lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of

religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the `Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term `granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking a State, or a subdivision of a State' and inserting or of a covered entity';

(2) in paragraph (2), by striking term' and all that follows through includes' and inserting `term covered entity' means'; and

(3) in paragraph (4), by striking all after `means' and inserting `religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking `and State'.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term `claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term `demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term `Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term `government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term `land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term `program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term `religious exercise' includes any exercise of religion, whether or not

compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON

THE GREATER BIBLE WAY TEMPLE OF JACKSON, a Michigan ecclesiastical corporation,
Plaintiff/Appellant,

-v-

CITY OF JACKSON; JACKSON PLANNING COMMISSION; AND JACKSON CITY COUNCIL,
Defendants/Appellees.

HON: ALEXANDER C. PERLOS

FILE NO: 01-3614-AS

BRIAN W. SURGENER (P46229)
PHILLIP M. STEVENS (P21007)
Attorneys for Plaintiff
HUBBARD, FOX, THOMAS, WHITE & BENGTSON, P.C.
5801 W. Michigan Ave., P.O. Box 80857
Lansing, MI 48908-0857
PH: (517) 886-7176
FAX: (517) 886-1080

CLAIM OF APPEAL AND CLAIM IN VIOLATION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)

NOW COMES, The Greater Bible Way Temple of Jackson, by and through its attorneys, HUBBARD, FOX, THOMAS, WHITE & BENGTSON, P.C., and claim an appeal from the determination of the Defendants, and claim a violation of RLUIPA, saying in support as follows:

1. Plaintiff/Appellant, The Greater Bible Way Temple of Jackson (hereafter The Greater Bible Way Temple) is a religious organization located at 322 Madison Street, Jackson, Jackson County, MI 49202.

2. Defendant City of Jackson is a Michigan City, situated in Jackson County, that has promulgated and enforces its own City Zoning Ordinance.

3. Defendant Jackson Planning Commission is a board authorized under the City of Jackson Ordinances to address and issue recommendations pertaining to zoning issues, and more particularly, applications for rezoning.

4. Defendant Jackson City Council is the Council for the City of Jackson, authorized by City Ordinance to enforce and otherwise make decisions under the City of Jackson's zoning code.

5. This matter is within the jurisdiction of this Court pursuant to MSA 5.2963(23a). Moreover, jurisdiction of this Court is also established by the City of Jackson's Code, Section 28-244(f).

COUNT I
CLAIM OF APPEAL

6. The Greater Bible Way Temple is a large church located in the City of Jackson with a congregation of 500+, and one which has done a considerable amount of good for the City of Jackson and its citizens.

7. The Church is located at 322 Madison Street, and owns an adjacent 1.13 acre lot bounded by Blackstone, Jefferson, Lansing and Madison streets.

8. In part, the Mission of The Greater Bible Way Temples is as follows: "The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes housing, employment, consulting and supports as determined appropriate in fulfilling our Mission." (emphasis added)

9. The above Mission is so strongly integrated into their belief that the Mission is printed on the church's letterhead.

10. In keeping with their Mission, the Greater Bible Way Temple submitted a site plan to the City of Jackson to build and develop a 32 unit

apartment building to house, in part, elderly and disabled persons.

11. In order to comply with the City of Jackson's classification of zoning, the property was required to be zoned R-2 (multiple family residential).

12. Since the property was zoned R-1 (single family residential), The Greater Bible Way Temple filed an application with the Jackson Planning Commission, requesting a zoning change from R-1 to R-3.

13. On or about April 3, 2001, the Jackson Planning Commission's staff drafted a written recommendation denying the request. (See Exhibit 1)

14. On or about April 11, 2001, the Jackson Planning Commission held a public meeting, which resulted in a denial of the rezoning request. (See Exhibit 2)

15. On or about April 24, 2001, the Jackson City Council convened a public hearing to consider The Greater Bible Way Temple's rezoning request. The Council voted to delay action until the next meeting. (See Exhibit 3)

16. On or about May 8, 2001, the Jackson City Council voted to concur with the Jackson Planning Commission's recommendation and denied the rezoning request. (See Exhibit 4)

17. The City of Jackson/Jackson City Council/Jackson Planning Commission never supplied a written denial to The Greater Bible Way Temple. Pursuant to Section 28-244(f), a written denial was required. Moreover, Due Process mandates that a written denial be given so that a party may be fully informed of the City's action and their procedural rights under law.

18. Plaintiff's attorneys requested a written decision, and on or about June 26, 2001, the Attorney for the City of Jackson provided a written denial of the rezoning request. (See Exhibit 5)

19. It is widely known that there is a shortage of housing within the City of Jackson and surrounding area.

20. There is an even greater shortage of housing for the disabled and elderly with the City of Jackson and surrounding area.

21. The proposed project would have provided a recognizable and substantial benefit to the ultimate users of the project and to the community.

22. In order to continue with their Mission, and to find a resolution of the unreasonable denial of the City, The Greater Bible Way Temple submitted a 20 unit planned residential development to the City Planning Commission. The representatives of The Greater Bible Way Temple were told that it would not be approved, and upon information and belief, the City will formally deny the request.

23. Section 28-137 of the Jackson Zoning Code provides a clear avenue for the development of the project proposed by The Greater Bible Way Temple. The development plan clearly meets the "objectives" set forth in Section 28-137(b), and does not violate any of the provisions contained in 28-138.

24. Planned unit residential developments contemplated under Sections 28-137 and 28-138 give the Defendants the power to approve the submitted development without rezoning the property.

25. The Defendants failed to consider the submitted cite plan as a planned unit residential development and properly analyze it under Section 28-137 of the zoning code.

26. Had it done so, the proposed project would have been approved and rezoning would not have been required.

27. Various demeaning, negative and prejudicial comments were made by persons making up the Defendants' boards, which would give rise to the conclusion that the Defendants acted in religious discrimination.

28. The rezoning request, and proposed project, are consistent with the intent, spirit and purposes of the City of Jackson Zoning Ordinances and are not contrary to public use.

29. The rezoning request would not have caused a substantial adverse effect on property

values in the immediate vicinity of in the zoning district.

30. The rezoning would not result in an unreasonable increase in the use of public services, facilities and utilities, and would not have placed an unreasonable burden upon the subject and/or surrounding land and/or property owners.

31. The decisions of the Jackson City Council and Jackson Planning Commission were not supported by competent, material and substantial evidence on the record.

32. The decisions of the Jackson City Council and Jackson Planning Commission were arbitrary, capricious and without foundation under the City of Jackson Zoning Ordinances or applicable Michigan law.

WHEREFORE, Plaintiff/Appellant The Greater Bible Way Temple requests that this Court issue a judgment in their favor and against the Defendants reversing the decision of Defendants and requiring them to issue the rezoning as requested. If deemed necessary, Plaintiff/Appellant requests that this Court remand the case to the Defendants for a proper determination under Section 28-137 of the City Zoning Code as it pertains to Planned Unit Residential Developments.

COUNT II
VIOLATION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA)

33. The above allegations are repeated and realleged as if set forth anew.

34. The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc, et al., is applicable to the facts herein.

35. RLUIPA, 42 USC 2000cc, provides in pertinent part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:
>
> (A) is in furtherance of a compelling governmental interest; AND
>
> (B) is the least restrictive means of furthering that compelling governmental interest
>
> This subsection applies in any case in which--
> (C) the substantial burden imposed in the implementation of a land use regulation or system of land use regulations, under which a government make, or has in place formal or

informal procedures or practices that permit government to make, individualized assessments of the proposed uses for the property involved.

36. The actions of the Defendants have imposed a substantial burden on The Greater Bible Way Temple's exercise of religion and in the furtherance of their Mission as previously stated herein.

37. The Defendants do not have a compelling governmental interest in denying the rezoning request. In fact, given the lack of affordable and quality housing within the City of Jackson, the Defendants [sic] compelling government interest is to see that projects such as the one proposed are encourage [sic] and built.

38. The Defendants have failed to use the least restrictive means of furthering any interest that they may have.

39. The Greater Bible Way Temple has been substantially burdened and cannot continue its Mission to provide housing to disabled and elderly persons.

40. The location of the proposed residential development so closely connected to the existing church provides a clear benefit to the church and to the disabled and elderly occupants of the proposed residential units.

41. The Joint Statement of Senator Hatch and Senator Kennedy on RLUIPA of 2000, 146 Congressional Record at S774, S775 demonstrates the underlying basis of RLUIPA, and displays the underlying religious discrimination of the Defendants:

> The hearing record compiled massive evidence that [the right to build, buy or rent space to assemble for religious purposes] is frequently violated. Churches in general, and new, small or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation....
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race of religions as the reason to exclude a proposed church.... **More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'**
>
> * * *
>
> The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.

42. The decision process of the Defendants is entirely discretionary and violates Plaintiff's right of free exercise and amounts to religious discrimination.

WHEREFORE, Plaintiff/Appellant The Greater Bible Way Temple requests that this Court issue a judgment in their favor and against the Defendants reversing the decision of Defendants and requiring them to issue the rezoning as requested. It further requests that this Court apply RLUIPA and determine that the Defendants violated it and require the Defendants to issue the rezoning as requested. If deemed necessary, Plaintiff/Appellant requests that this Court remand the case to the Defendants for a proper determination under Section 28-137 of the City Zoning Code as it pertains to Planned Unit Residential Developments.

Respectfully submitted,

HUBBARD, FOX, THOMAS, WHITE & BENGTSON, P.C.

By: /s/ Brian W. Surgener
Brian W. Surgener (P46229)
Phillip M. Stevens (P21007)
Attorneys for Plaintiff

City of Jackson Code of Ordinances

Sec. 28-38. R-3 multiple-family residential district.

The multiple-family residential district is established for multiple-family residential use. The regulations are designed to protect and promote a more intensive residential character than the R-1 and R-2 districts and to prohibit all commercial activities. All types of residential structures are permitted, but the predominant type will be multiple-family dwellings, including apartments, townhouses and conversations of single-family dwellings into multiple units.

(Code 1977, § 5.33)

Sec. 28-183. Procedure for change.

The application for any proposed zoning change shall be directed to the city council on forms prescribed for such purpose, accompanied by sufficient information, so as to assure the fullest presentation of facts for the permanent record.

(1) *By application.* Any person, firm or corporation desiring a change in the zoning classification of property shall file with the city clerk an application for zoning change. When the application for zoning change appears to be in accordance with public necessity, convenience, safety and the general welfare of the city, the city council shall refer such application to the city planning commission.

a. *Notice of hearing.* The city planning commission shall then hold a public hearing on such proposed amendment, supplement or change as set forth in the application, notice of the time and place of which shall be given not less than fifteen (15) days prior to such hearing, by one (1) publication in a newspaper of general circulation in the city, and by registered mail to each public utility company and to each railroad company owning or operating any public utility or railroad within the district affected, that registers its name and mailing address with the city clerk for the purpose of receiving the notice. An affidavit of mailing shall be maintained.

b. *Additional notice of hearing.* In addition to the published notice required by law, the city planning commission shall give notice of the time, place and purpose of its public hearing to be held on the proposed amendment, supplement or change, by mailing written notice of same to the last known address of the owners and occupants, as shown on the records of the assessor, of all properties lying within three hundred (300) feet of any part of the property, the zoning classification of which is proposed to be changed.

Failure to send notice by mail to any such property owner where the address of such owner is not a matter of record in the assessor's office shall not invalidate any proceedings in connection with the proposed amendment, supplement or change. When such amendment, supplement or change does not include any change of district boundaries or classification of property, this additional notice of hearing shall not be required.

c. *Public hearing.* The city planning commission shall adopt rules and regulations for the conduct of public hearings consistent with law and the provisions of this Code.

d. *Procedure following public hearing.* After the public hearing on such amendment, supplement or change, the city planning commission shall make its report. Such report shall be by resolution of the city planning commission carried by the affirmative votes of the majority of members in attendance. Such amendment, supplement or change, with report, shall then be certified in writing to the city council and to the county register of deeds.

e. *Action by city council.* Such amendment, supplement, or change, accompanied by the report of the city planning commission, shall then be presented to the city council. The city council shall hold a public hearing on such proposed amendment, supplement, or change pursuant to the publication and notice requirements prescribed in this section. Following such public hearing, such amendment, supplement or change may be adopted or denied only by the affirmative votes of not less than four (4) members of the city council. [Amended November 25, 2003.]

f. Upon presentation of a protest petition meeting the requirements for this section, such amendment, supplement or change which is the object of the petition shall be passed only by a two-thirds (2/3) vote of the city council. The protest petition shall be presented to the city council before final legislative

action on the amendment, and shall be signed by one (1) of the following:

1. The owners of at least twenty (20) percent of the areas of land included in the proposed change, excluding publicly owned land.

2. The owners of at least twenty (20) percent of the area of land included within an area extending outward one hundred (100) feet from any point on the boundary of the land included in the proposed change, excluding publicly owned land.

g. Whenever a proposed amendment, supplement or change has not been approved by the city planning commission and the city council concurs by not adopting it, such amendment, supplement or change shall not be resubmitted to the city council for at least one (1) year from the date of the city council denial, excepting when it is established to the satisfaction of the city council that there has been a material change in circumstances justifying reconsideration.

(2) *By resolution.* Whenever deemed necessary for public convenience, general welfare or good zoning practice, the city planning commission, or the city council may initiate an amendment, supplement or change in the form of a resolution for zoning change provided it is adopted by a majority vote of the full membership of either of the respective commissions. Such proposed amendment, supplement or change to this chapter shall then be handled in accordance with

the same procedure for filing an application for zoning change.

(Code 1977, § 5.262; Ord. No. 2003.20, § 1, 11-25-03)